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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY,

Petitioners,

vs.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

Respondents.

BRIEF FOR PETITIONERS

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OPINIONS OF THE COURTS BELOW

The opinions of the Circuit Court of Appeals are reported in 91 Fed. (2d) 665. Judge Parker's opinion, written for the Court, appears in the record at pp. 849-873, and Judge Soper's dissenting opinion at pp. 873-878.

The opinion of the District Court subsequent to the remand of the case by this court is reported in 19 Fed. Supp. 932, and appears in the record at pp. 744-778. The opinions of the District Court prior to the remand of the case by this Court will be found: on motion to dismiss, R. 117-52, reported 10 Fed. Supp. 854; on merits after hearing on evi-

dence, R. 477-483, reported 12 Fed. Supp. 70; and on first rehearing, R. 518-527.

JURISDICTION

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code as amended by the Act of February 13, 1925; U. S. Code, Title 28, §347. The decree of the Circuit Court of Appeals to be reviewed was entered August 6, 1937 (R. 878-9). The petition for certiorari was filed in this Court September 10, 1937, and was granted October 25, 1937.

STATUTES INVOLVED

The case involves Title II of the National Industrial Recovery Act, Secs. 201, 202, 203, 206, 210(a), and 220, Act of June 16, 1933; 48 Stat. 200, 201, 202, 204, 206, and 210; U.S.C., Title 40, Secs. 401, 402, 403, 406, 410 and 411. The declaration of policy in Title I and the pertinent sections of Title II appear in the Appendix, separately printed, pages 1-7.

There also appears in the Appendix, separately printed, Act No. 299 of the 1933 Acts of the General Assembly of the State of South Carolina, (Appendix pages 7-22) and Act No. 1095 of the 1934 Acts of the General Assembly of the State of South Carolina. (Appendix, pages 22-23).

STATEMENT OF THE CASE

This cause was before the Court at the October Term, 1936. The merits were not then passed upon but because of irregularities in procedure resulting in the record not being properly made up the cause was remanded for further proceedings.

The petitioner,* an electric public utility corporation, by its amended and supplemental bill of complaint challenged the action of the Federal Emergency Administrator of Public Works in selecting for construction, under Title II of the National Industrial Recovery Act as a public works project, a local electric power plant in Greenwood County, South Carolina, and in allotting federal funds to Greenwood County for the construction of said plant which would be operated in direct competition with petitioner. The petitioner does not seek an injunction against lawful competition by Greenwood County and a decree in favor of petitioner would leave the County entirely free to compete with petitioner in any lawful manner. What petitioner seeks is an injunction against the illegal construction of said plant as a federal public works project by means of federal funds.

After a hearing on the merits the District Court rendered a final decree enjoining the Federal Administrator from advancing and the County and its officials from receiving federal funds for the construction of said plant and also enjoining respondents from carrying out a contract dated December 8, 1934, between the United States and Greenwood County relating to the disbursement of said federal funds.

Respondents appealed to the Circuit Court of Appeals. The Administrator informed that court that, since the taking of the appeal, the contract of December 8, 1934, had been terminated and a new agreement, dated November 30, 1935, substituted and asked that the cause be remanded

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* During the pendency of this litigation the Southern Public Utilities Company, one of the original plaintiffs and the wholly owned subsidiary of the Duke Power Company, the other plaintiff, was merged with the Duke Power Company, which company succeeded to all the assets and liabilities of the Southern Public Utilities Company. Consequently, the Duke Power Company is now referred to as the petitioner.

to the District Court for further hearing. The motion of the Administrator alleged that the terms and conditions of the earlier contract, which he asserted had been held by the District Court to be in excess of the power and authority of Greenwood County under the laws of South Carolina, had been eliminated. It was because of irregularities resulting from the way in which the Circuit Court of Appeals dealt with this motion that this court reversed the decree of the Circuit Court of Appeals and remanded the cause to the District Court with directions that the decrees theretofore entered by that court be vacated, "that the parties be permitted to amend their pleadings in the light of the existing facts and that the case be retried upon the issues thus presented." 299 U. S. 259.

Upon receipt of the mandate of this court, the District Court entered an order setting aside the decrees which it had theretofore rendered, and permitted the parties to file further pleadings. (R. 541-2). The respondents filed supplemental answers showing the new agreement of November 30, 1935, and alleged that this new agreement had entirely superseded the previous agreement of December 8, 1934. (R. 543-6). Petitioner filed a reply to the supplemental answers admitting the execution of the new agreement, but denying that it worked any material change in the case or in the issues presented. It alleged that the changes made by the substitution of the new agreement for the prior agreement were matters of verbiage only, leaving the loan and grant and the proposed project the same in character, purpose and effect and subject to the same infirmities and objections. (R. 546-8).

The District Court held that the mandate of this Court required that the case be heard de novo and accordingly did not limit its inquiry to the effect of the changes made in the contract as presented by the motion to remand, but heard the entire cause anew. (R. 555-7).

The evidence taken in the cause on the original hearing was treated as a part of the record for the purposes of the retrial. The testimony of Secretary Ickes and other witnesses taken in the District Court following the first remand of the case by the Circuit Court of Appeals was, by stipulation of the parties, introduced as if taken by deposition. Much additional evidence was introduced, relating principally to three questions:

1. The new loan and grant agreement of November 30, 1935, entered into between the Government and Greenwood County, in substitution of the previous agreement of December 8, 1934, and whether this new agreement cured the alleged illegality of the original allotment or resolution of the Public Works Administration, whereby the project was included in the so-called comprehensive program of public works and funds allotted for its construction, for the carrying out of which original allotment or resolution the new agreement, like the previous agreement, was entered into. (R. 368-9, 464-5, 562-3).

2. The alleged power plan of the Public Works Administration and its alleged policy to use its power to make loans and grants of federal funds for the construction of local electric power plants in such a fashion as to regulate local electric rates and to establish publicly owned local electric power plants whose rates would serve as yardsticks for the reduction of electric rates. (R. 576, 578, 593-4, 595-602, 605, 606, 608, 611-16, 619-27, 654-64, 702.)

3. The injury which petitioner would sustain as a result of the proposed use of federal funds for the construction of the plant. (R. 558-63, 566, 567-70, 670, 688, 691, 696-7.)

The District Court upheld the validity of the loan and grant and dismissed the bill on the merits. (R. 799-800). It filed an extended opinion on all the questions involved

(R. 744-778) and separately filed findings of fact and conclusions of law. (R. 779-799). Petitioner appealed to the Circuit Court of Appeals. (R. 848).

In affirming the judgment of the District Court, the Circuit Court of Appeals held that the District Court had correctly construed the mandate of this court as requiring the entire cause to be heard de novo, and not as intended to limit the retrial to matters which had occurred subsequent to the original decree of injunction of August 26, 1935. (R. 850-1). On this point Judge Soper did not dissent. On the questions involving the constitutionality of the statute, the authority of the Administrator under the statute to make the loan and grant, and the right of petitioner to sue the majority of the Court of Appeals followed the majority opinion on the former appeal, 81 F. (2d) 986. (R. 848-873, 91 F. (2d) 665). On these questions Judge Soper again dissented, holding that the additional evidence taken upon the retrial strongly supported the conclusions on which his former dissent was based. (R. 873-8).

MATERIAL FACTS

The petitioner is a public utility corporation generating and selling electric power in South Carolina at rates approved by the Public Service Commission of that State. It is the only power company doing business in Greenwood County, South Carolina, and surrounding counties.

On November 16, 1933, Greenwood County made application to the Federal Emergency Administration of Public Works for a loan and grant of federal funds under Title II of the National Industrial Recovery Act amounting to $2,627,197.00 for the construction of an electric power plant at a point known as Buzzard Roost on Saluda River in said County. This application stated that the rates to

be charged by the proposed Buzzard Roost plant were only slightly above the TVA rates which would be applied in Tupelo, Miss., and that the proposed plant would establish in the territory in which it would operate an economical electric service similar to that set up by the Tennessee Valley authority and would furnish a proper and fair "yardstick" or measure of the cost of hydro-electric power. (R. 267, Defendants' Exhibit 49, R. 712-3).

On this application being filed the petitioner's rates were investigated by the Federal Administrator and the conclusion was reached by him that the petitioner's rates were excessive. (R. 300, 654, 655, 660, 662-3). The rates of the proposed plant being materially lower than the petitioner's rates, the application met the required test of criteria of the Federal Administrator in passing upon applications for loans and grants for the construction of competing municipal power plants. Accordingly the application was approved by resolution of the Public Works Administration dated June 20, 1934, (R. 369, 464) which resolution included the plant in the so-called comprehensive program of public works and made the allotment by way of a grant and so-called loan for its construction as a federal public works project. The amount of the allotment was later increased to $2,852,000.00 by resolution dated November 7, 1934. (R. 368-9, 464-5).

The entire cost of the plant would be defrayed by the federal government: 30% of the cost would be an outright gift or subsidy, no part of which would ever have to be repaid; the balance of the cost would be repaid by a so-called loan secured by special revenue bonds, both the principal and interest of which would be repayable, if at all, only out of the prospective revenues of the plant. The County, itself, would make no investment in the plant and

would assume no liability or obligation of any character for its construction or operation. (R. 179, 199-200.)

The proposed plant would be a purely local enterprise operating in Greenwood County and in the two adjoining counties of Newberry and Laurens. It would engage in the general utility business of furnishing electric power to municipalities, industrial enterprises, private individuals and the public generally for domestic, industrial and commercial uses, and would operate in direct competition with petitioner. (R. 175).

We shall hereafter show in detail the criteria, standards or tests by which actions of the Federal Administrator were controlled in passing on applications for loans and gifts for local electric power plants, and that the lowering of rates was the controlling factor in the making of the loan and grant in the instant case.

As heretofore stated the business of the petitioner is subject to the jurisdiction and control of the Public Service Commission of South Carolina and its rates have been approved by that Commission as just and reasonable. The laws of that state require petitioner to maintain at all times adequate and efficient service and the Commission may at any time require such extensions and additions to existing facilities as may be necessary. Without the permission of the Commission the petitioner cannot abandon all or any part of its service to the public. (R. 123-124).

In order to serve the territory in which the petitioner does business, including the three counties in which the proposed project would operate, the petitioner has invested millions of dollars in equipment and operating facilities. These facilities are amply sufficient to meet the present requirements of this area and any demand reasonably to be expected in the future. In the three counties of Greenwood, Newberry, and Laurens, petitioner owns valuable

property, franchises and operating rights which are now used in serving these counties. (R. 168-172).

The customers to be served by the proposed plant would be those who are now, and for a number of years have been, served by the petitioner and the success of the proposed plant would depend upon the extent to which it could alienate petitioner's customers. The rates of the proposed plant have been fixed substantially below those of petitioner. The rate for wholesale service to municipalities is approximately 30% lower than petitioner's rate for this service; the rate to Industrial Consumers about 21% lower than petitioner's textile rate and about 25% lower than petitioner's rate to its industrial consumers; and the residential rate about 26% lower than petitioner's similar rate. (R. 558). These lower rates would be made possible by the federal subsidy and would be an essential part of the plan under which the plant would be constructed as a federal public works project. (R. 179, 199-200, 560-1, 643, 696).

Contracts have been made for the sale of practically the entire output of the proposed plant with consumers who are now and for a number of years have been customers of petitioner. (R. 340-1, 176-7, 314, 559, 691, 371-398). Each of these contracts is conditioned upon its approval by the Public Works Administration. (R. 371-98).

The effect of the construction of the plant as a federal public works project upon petitioner would be to force it to reduce its rates, deprive it of a large part of its business, and in large measure, to destroy the value of its property heretofore devoted to serving the public. In the three counties of Greenwood, Newberry and Laurens alone petitioner would sustain an annual loss in revenue of approximately $250,000.00 and the value of its property used for serving that territory would be seriously damaged if not destroyed. (R. 559-62, 565-6, 568-70).

Even if petitioner attempts for a while to hold out against the lower rates and accepts the loss of $250,000.00 annually in the Greenwood area the effect of the lower rates would be to force material reductions in petitioner's rates not only in that area, but also in the surrounding and adjacent territory in which it operates. (R. 561-2, 569).

The District Court dealt with the question of the "yardstick" regulation of the petitioner's rates by the proposed plant upon the theory that if the "yardstick" applied by the Buzzard Roost rates should be applied to the petitioner's rates by the regulatory Commission of South Carolina the petitioner could then complain; and that any complaint prior thereto would be premature. This same view was adopted by the Circuit Court of Appeals which pointed out that the rates of the proposed plant would not be a fair measure of the petitioner's rates because of the difference in the cost of construction, financing, etc. (R. 858). The District Court said:

> "We cannot assume that the South Carolina Public Service Commission or other regulatory body is going to stultify itself by failing to consider the major difference in the nature of the investment involved in the two plants.
>
> * * * Time will be to complain if after certain facts or yardsticks are ascertained, a regulatory body vested with the power seeks to apply such yardstick in an arbitrary, discriminatory and unjust manner. To justify the granting of an injunction on the yardstick theory of the case, the plaintiff must show this Court not merely that the proposed rates will supply the yardstick, or furnish from a friendly source information about the costs of producing electricity, but that this yardstick when once ascertained is about to be used by a regulatory body in an illegal manner." (R. 763-4).

Such a view entirely misconceives the theory as well as the operation of the PWA plan and ignores the actual coercive effect the subsidized plant would have upon the petitioner's rates as a practical matter. The theory of the PWA plan is that state control of rates through regulatory commissions has failed to accomplish the desired results and that therefore the more drastic and effective "yardstick" method of regulation is necessary. It has never been suggested that the "yardstick" method was designed or intended to operate through established legal channels or that it would furnish a lawful measure of rates to be legally applied by any duly constituted authority. The effectiveness of the plan and also one of the principal legal objections to it, lie in the fact that it operates outside of legal channels. The principal purpose of the "yardstick" method is to shortcut and supplant the established lawful method of regulating rates and to force reductions whether they are legally justified or not.

As to the petitioner's direct and certain loss of revenue in the Greenwood area, the respondents undertake to minimize this injury by pointing out the increase in petitioner's business which is created in other parts of the territory in which it does business, apparently attempting to offset the loss which petitioner will sustain in the Greenwood area by the increased business which it has been able to do elsewhere.

In the first place this contention of the respondents erroneously assumes that the petitioner would suffer no loss except that of $250,000.00 annually in the Greenwood area. In the second place it is no answer to the threatened injury to its business in that area to say that it has been able to increase its business elsewhere. Manifestly the petitioner has a legal right to the annual growth and extension of its business throughout different parts of the territory in which it operates. It may not lawfully be de-

prived of this right nor can such annual growth and extension be urged as justification for the destruction or injury of its business in any particular part of the territory in which it operates.

Further material facts will be stated in the appropriate place during the course of the subsequent argument.

SPECIFICATION OF ERRORS

Petitioner intends to urge the errors specified in its petition for a writ of certiorari (page 11 of the petition).

The errors specified raise 3 principle questions, as follows:

1. Whether the Circuit Court of Appeals erred in holding that, in the circumstances disclosed by the record, Title II of the National Industrial Recovery Act authorizes the action of the Public Works Administrator in making a loan and grant of federal funds to Greenwood County, South Carolina, for the construction of a local municipal electric utility as a federal public works project.

2. Whether the Circuit Court of Appeals erred in holding that Title II of the National Industrial Recovery Act (48 Stat. 200, et seq.), as applied to this case and as construed to authorize the action of the Public Works Administrator in making a loan and grant of federal funds to Greenwood County, South Carolina, for the construction of a local municipal electric utility, is constitutional, the error being that said statute as so applied and construed, is unconstitutional, in that:

(a). It is not within any power delegated to Congress by the general welfare clause, U. S. Constitution, Art. I, Sec. 8, Cl. 1, or by any other clause or provision of the U. S. Constitution; and is violative of the Tenth Amend-

ment to said Constitution, in that it invades powers and governs and controls matters reserved to the States.

(b). It unlawfully delegates legislative power to the executive department of the government, in violation of Art. I, Sec. 1, of the U. S. Constitution, and of the other provisions of said Constitution which prohibit the delegation of legislative power to the executive department.

(c). It deprives petitioner of its property without due process of law, in violation of the Fifth Amendment to the U. S. Constitution.

3. Whether the Circuit Court of Appeals erred in holding that, even if Title II of the National Industrial Recovery Act (48 Stat. 200, et seq.), as applied to this case, be unconstitutional, or the proposed action of the Federal Administrator be unauthorized by said Act, yet petitioners are not entitled to question the legality of said action even though their property and business will be irreparably damaged, if not destroyed, and their rates regulated and reduced by the proposed use of federal funds for the construction of said local electric utility.

SUMMARY OF ARGUMENT

The argument is directed to the questions above stated.

Petitioner contends that the action of the Administrator in approving the Buzzard Roost project and in alloting funds for its construction as a federal public works project was unauthorized by Title II of the National Industrial Recovery Act. The statute authorized the Federal Administrator to use the funds placed at his disposal only for the purpose of relieving unemployment; whereas the Buzzard Roost project was approved and funds allotted for its construction as a federal public works project pur-

suant to and in accordance with the PWA power plan to reduce local electric power rates.

The new contract of November 30, 1935, entered into between Greenwood County and the United States, in substitution of the prior contract of December 8, 1934, was merely in aid of and is dependent upon the original allotment of funds. Therefore, it did not cure the illegality of the allotment, but is subject to the same illegality as the allotment itself. The new contract did eliminate the provision contained in the prior contract requiring the County to adopt a rate resolution satisfactory to the Administrator. But rates satisfactory to the Administrator had already been adopted by the County, contracts for the sale of power from the project had already been made with petitioner's customers on the basis of these rates, and no change was made in either the rates or the contracts following the change in the loan and grant agreement. The change in the loan and grant agreement was a purely formal change, leaving the factual situation wholly unaffected.

Petitioner contends that if Title II of the National Industrial Recovery Act be construed to authorize the action of the Administrator in this case, said Act is unconstitutional, in that:

(a). The use of federal funds to control and reduce local electric rates is an attempt to achieve an end denied the Federal Government, and invades powers reserved to the states, in violation of the 10th Amendment.

(b). The use of federal funds to construct a local electric power plant at Greenwood, South Carolina, as proposed, is not within the power conferred upon Congress

by the General Welfare Clause, Art. I, Sec. 8, Cl. 1, or by any other clause or provision of the Constitution.

(c). The Act is an unconstitutional delegation of the power of Congress to spend for the general welfare.

(d). Petitioner will be deprived of its property without due process of law, in violation of the Fifth Amendment of the United States Constitution.

Petitioner contends that it is entitled to maintain this suit for the reasons that the action of the Administrator herein complained of will deprive petitioner of its customers and force it to make material reductions in its rates, thereby seriously injuring its property and business; that petitioner's business is a private property interest which the law will protect; and that because petitioner will be specially grieved by the unauthorized and illegal action of the Federal Administrator it is entitled to maintain this suit for an injunction against such action.

Petitioner contends that the foregoing questions should have been considered and determined upon the record made at the original hearing, and that the trial court should have rendered its decree on that record, because, the respondents having failed to establish the allegations of the motion on which the cause was remanded for retrial, the trial court erred in granting the respondents a rehearing of the original cause and in permitting them to introduce evidence in contradiction of the evidence taken on the original hearing.

ARGUMENT

I.

The evidence shows that the Buzzard Roost project was included in the comprehensive program of public works for construction under Title II of the National Industrial Recovery Act and that federal funds were allotted for its construction pursuant to the PWA power plan to reduce power rates.

Under this heading we shall attempt to demonstrate that the Administrator allotted funds for this particular project because of his emphatically expressed opinion that petitioner's rates were excessive; that his principle object in thus allotting said funds was to effect a reduction in power rates; and that his action in the instant case was in line with his general plan and power policy to make allotments for the construction of competing municipal power plants only when a reduction in local electric power rates would be thereby effected.

Mr. C. E. Rose was the only representative of the Public Works Administration who appeared as a witness on the original hearing, and, he then testified as follows:

> "The Duke Power Company will be the only competitor of the Buzzard Roost project, so *we estimated a rate schedule for the project* which would yield 6.5 mills for the industrial consumers of good load capacity, and 8.2 mills as a municipal rate, both of which are under the Duke rates. The Duke rates do not meet with the approval of the PWA authorities. *We think they are excessive, and it is because we think they are excessive that the PWA approved this grant.* That is one of the reasons for the approval of the grant. As to whether, if the Duke rates had met with the approval of the PWA authorities the loan and grant would have been approved,

> I can say that *we* (meaning PWA) *have never approved a project where a privately owned company has made a satisfactory adjustment.* That doesn't mean we will not. It is the policy of the PWA not to approve loans and grants where privately owned utilities have reduced their rates satisfactory to the PWA, and it was in line with that policy and because of that policy that I made the investigation as to the Duke rates." (R. 300). (Italics supplied).

The official statement of the power policy of the Public Works Administration issued by it on September 27, 1934, was introduced as Petitioner's Exhibit 35. This exhibit was an official statement issued by the Public Works Administration and quoted the Administrator himself on the subject of his power policy. The statement was produced by counsel for the Administrator from among the records of the Public Works Administration in response to notice by the Petitioner to produce the same. (R. 263). The statement appears on pages 361-3 of the record and reads in part as follows:

> "Achievement in certain instances of the administration purpose of making electric energy more widely available at cheaper rates today led to a clarification of the policy on power by the Public Works Administration.
>
> "Municipal or local publicly owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.
>
> * * *

"In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program."

* * *

Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating.

* * *

"PWA will coöperate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect."

Secretary Ickes offered himself as a witness on the rehearing before Judge Watkins in December, 1935, and his testimony then given was, as stated above, used as a deposition on the retrial of the case before Judge Glenn.

His testimony was principally directed to the evidence taken on the original hearing. He said that Rose's testimony was not a correct statement of PWA policy, in so

far as it differed from his own testimony as to such policy then given on the rehearing; that Rose, though the only witness for PWA on the original hearing, "was not authorized to speak for the Public Works Administration with respect to anything, policy included" (R. 649); that the announcement of PWA power policy—released to the press in September, 1934, and produced on the original hearing by his counsel (R. 263, 361, Petitioner's Exhibit 35) —did not correctly set forth the policy "standing alone." (R. 651). In contradiction of the testimony of Rose and the statements in the official announcement of September, 1934, he declared that he had no interest in power rates, except "such interest as any bondholder would have" in lending money on revenue bonds. (R. 643).

On cross examination he said that on the County's application being filed he had had an investigation made of the Duke rates and came to the conclusion that they were excessive and that he still considered them excessive although he admitted that he had no facts on which to base this conclusion. (R. 654, 655). He stated that Mr. Rose was one of the PWA engineers who had investigated the Duke rates for him. (R. 654). He stated further that the Duke Power Company was one of the Public Utilities against which PWA had been directing its efforts in carrying out its program to reduce electric power rates. (R. 660). He testified further that he had recently published a book in which he had described the power plan and program of the Public Works Administration and that the description given in that book correctly stated the facts and that there had been no change in this power program or in its aims and purposes since the publication of the book. (R. 653, 656, 664).

For the sake of accuracy we quote the pertinent parts of the Administrator's testimony on these points, as follows:

"I recently published a book entitled 'Back to Work', with the sub-title 'The Story of PWA'. (R. 653).

"As to the statements contained in this book they are facts which I wrote as facts. The statements contained in the book are related as facts; that doesn't necessarily mean my own conclusions.

"On page 126 of the book referring to the construction of dams generally, I say: 'This activity is only the beginning of a national plan to increase the supply of electric power and to bring down its cost.'

"Ques. And that is the fact, is it not—the activities to which you are referring in your book, the construction of these plants, is part 'of a national plan 'to increase the supply of electric power,' and make it more widely available? Ans. Yes, I understand that the Administration is committing the crime of trying to decrease electric power rates. (R. 658).

"On page 134 of my book, I say this: 'This is the picture in broad outline of TVA, at the present time. Soon it is to be expected, the idea will be extended to other sections of the country. Moreover, TVA—and this is one of the main reasons for its establishment—will provide a "yardstick" for the measurement of similar rates in other parts of the Nation, with the result of forcing pretty generally a reduction of private utility charges.'

"On page 135 of the book I say: 'This TVA enterprise has appealed particularly to the public imagination because of its magnitude and on account of the broad social concept that underlies it. Yet this is not the only front upon which the government, under its PWA program, has been advancing against those utility interests that have been exacting unconscionable tribute from the people of the United States for so many years.'

"This quotation correctly states the facts as I believe them to be. It correctly states my views as I believe them to be.

"Ques. And among those 'utility interests that have been exacting unconscionable tribute from the people of the United States for so many years,' you would class the Duke Power Company? Ans. I agree with you in that.

"Ques. No, I asked you if you would not so class the Duke Power Company? Ans. Yes. (R. 659-660).

"On page 136, referring to loans and grants to municipalities for the construction of municipal plants I say, 'Finally we have always given the private utility an opportunity to meet the City's proposed rates, and if this is done, the City is afforded a second chance to lower still further its anticipated charges.' (R. 661).

"In my book I refer to the accomplishments of PWA and state that it has saved to consumers millions of dollars 'through the lowering of rates by private utilities to meet the charges proposed by applicants for public power projects.'

"I say, 'The rejection or withdrawal of some of the 200 applications that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant.'

"Then on the next page I say, 'These "Yardsticks" provided by both municipal and Federal enterprises are so valuable that they alone would warrant PWA's expenditures for power undertakings. The municipal projects have caused private utilities to adjust their rates downward in wide areas and the Federal projects have brought about rate adjustments over still larger expanses of territory.' This quotation correctly states the facts. (R. 663).

"Ques. Now, Mr. Ickes, what I have read from your book correctly states the Public Works Administration's national power policy, as applied to all loans and grants for power projects, does it not? Ans. The Public Works Administration's policy is incorporated in the passages that you have read.

"There has been no change in that policy, as stated in my book, since August 26, 1935, when the final decree was entered in this case, and no change in my purposes and aims as Federal Emergency Administrator in carrying out that policy. (R. 664). Since the date of the entry of the final decree in this case there has been no change in the policy of the Public Works Administration. Since the date of the entry of the final decree in this case there has been no change in the aims and purposes of the Public Works Administration with respect to power—electric power. (R. 656).

"I charged in my book that the Duke rates were unreasonable because I believed it. The unreasonableness of the rates was the concern of any individual; especially the concern of a government official in my position. (R. 654).

"On page 143 of my book, I state, referring to the County project 'The fact is that it was proposed to distribute more than 80% of the power to be developed at Buzzard's Roost to new industrial and rural customers at a reasonable rate, something the Duke Power Company does not seem to be able to do.' I meant to say there that the Duke Power Company's rates are not reasonable and I think I say so quite plainly. (R. 654).

"When I referred in the book to 'the injustice of levying enormous tribute upon the people' I was referring to the rates which the Duke Power Company was charging its customers. That's the tribute. I have already answered the question as to what facts I had

upon which to base the charge in my book that the tribute was enormous and unjust. I have already stated, in response to the question, that I had reason to believe that the rates charged by the Duke Power Company were excessive; based upon the cost of production.

"* * * I have admitted that I had no facts. I acted on information and belief. * * * I still believe they are unreasonable based upon information and belief." (R. 655).

We turn now to the additional evidence taken on the retrial before Judge Glenn. We shall avoid a detailed recitation and indicate only its general character. This evidence related to acts of PWA officials in dealing with other applications for loans and grants for the establishment of similar municipal power projects to be operated in competition with privately owned utilities. The evidence relates to letters written and statements made by such officials in the course of their dealings with such applications. This evidence, we submit, shows that it was the general policy of the Public Works Administration, either by the threatened or actual use of federal funds, to bring about reductions in power rates which were considered too high by the PWA.

Mr. Frank T. Post, of Spokane, Wash., President of the Washington Water Power Co., testified as to his negotiations with the Public Works Administration in regard to the loan and grant to Coeur d'Alene, Idaho, for the establishment of a municipal power project to be operated in competition with his company. This was the loan and grant involved in the case of Washington Water Power Co. v. City of Coeur d'Alene, 9 Fed. Supp. 263. The loan was to be secured, not by revenue bonds, but by general obligation bonds of the City. Mr. Post wired the Administrator protesting against the loan and grant. In reply he

received a telegram from the Administrator himself, dated November 12, 1934, in which the Administrator advised Mr. Post that the city proposed to put into effect rates 20% below the rates of the Power Company, that the Power Company had already had an opportunity to meet the city's proposal but that if the Company would place in effect a rate reduction equal to or greater than the city's proposed reduction the Electric Power Board of Review of the Public Works Administration would consider further the Power Company's protest. (R. 578). The matter was referred to the Electric Power Board of Review of which Mr. Henry T. Hunt was chairman. The correspondence between Mr. Hunt and Mr. Post was introduced in evidence; the purport of which may be indicated by the statement in Mr. Hunt's letter of November 26, 1934, that:

> "You state that the original application contains no proposal of a reduction in rates. However, Mayor Coe conferred here with Mr. O. M. Rau of this Board and with me, and we advised him that a substantial reduction in rates would be required." (R. 580).

It will be recalled that the Administrator testified that he had no interest in power rates except the interest of a banker lending money on revenue bonds and therefore was not concerned with rates when the bonds were general obligation bonds. The bonds in the case of Coeur d'Alene were general obligation bonds.

Mr. Edwin Vennard, of Evanston, Ill., testified that he was a rate expert representing about 30 operating electric companies located throughout the middle west; that he had a great many conferences with the Electric Power Board of Review concerning municipal power projects in cities and towns served by his companies; that he had conferred with all the members of the Board but particularly

with Mr. Hunt, chairman, and Mr. Rau, rate expert, and that these conferences related to 25 or 30 PWA projects distributed throughout about 10 states in the middle west. He said that some of these projects involved general obligation bonds and that no difference was made by the Public Works Administration in passing upon applications for loans and grants whether they were based upon general obligation bonds or revenue bonds; and that in all cases rates were the determining factor with the Public Works Administration. He said that the Public Works Administration took the position that rates generally were too high and should be reduced; that the procedure was that the protesting utility was given an opportunity to put into effect a rate at least equal to or lower than the proposed municipal rate and that if this was done the application for loan and grant was rejected unless the municipality came back with a still lower rate, in which event the application was reconsidered and the utility company given another opportunity to make a further reduction. (R. 593-4).

He said that one of the tests applied by the Public Works Administration was the so-called "social desirability" test. On this point he testified on cross-examination by counsel for the Administrator: "The question of the project being self-liquidating and the question of social desirability were separate and distinct questions. The question of social desirability was whether or not the rate of the municipal plant was lower than ours or ours lower than theirs. That was the test—the cheapest rate to the customer. That was not my idea. Social desirability was their term." (R. 604).

The correctness of Mr. Vennard's testimony cannot be disputed. It is confirmed by numerous letters and telegrams which he received from PWA. These letters and telegrams were introduced in evidence and appear in the

record as a part of Mr. Vennard's testimony. (R. 595-602).

Mr. D. E. Byerley, of Adrian, Mich., President and General Manager of the Citizens Light & Power Company, gave testimony to the same effect with reference to his dealings with the Public Works Administration with regard to the establishment of competing municipal projects in towns served by his company. (R. 606). His testimony was also corroborated and confirmed by his correspondence with PWA.

Mr. George H. Carter, of Marlin, Texas, a Director of the Texas Utilities Company, and the attorney for that company, testified that he represented his company in opposing the PWA loan and grant for the establishment of a municipal plant in Marlin in competition with his company. Col. Carter's dealings were with Mr. Hunt and Mr. Rau of the Electric Power Board of Review and also with Major Fleming who at that time was deputy administrator of Public Works. Col. Carter's testimony as to his dealing with PWA is to the same effect as the testimony of the other witnesses. It shows beyond the slightest doubt that in the establishment of competing municipal plants, the matter of rates was the controlling consideration with the Public Works Administration. Col. Carter testified that he had never heard of the Electric Power Board of Review and didn't know there was one until he received a telegram dated August 18, 1934, signed "H. T. Hunt, Chairman, Electric Power Board of Review, for the Administrator," reading as follows:

> "Reference project Marlin Electric System. Suggest you inform client this Board wishes ascertain whether company will place in effect rates less than those offered by municipality. Possibly its representative will call on me here promptly in order that this matter may be determined." (R. 611).

Prior to that time he had filed a protest in December, 1933, with the State PWA Advisory Board in Fort Worth. He said: "I argued the protest before the Advisory Board and then went back home. I heard nothing more and didn't know what had become of it. The next thing I heard was on August 18, 1934, when I received this telegram from Col. Henry T. Hunt." (R. 618). It was in response to this telegram that Col. Carter later went to Washington and had the dealings with the Public Works Administration about which he testified.

A number of letters were introduced between Col. Hunt and Mr. T. O. Kennedy, Vice-President and General Manager of the Ohio Public Service Company (R. 619-24); also a number of letters between Mr. Hunt and Miles Cary, Vice-President and General Manager of the Public Service Company of Orlando, Fla. (R. 624-7). These letters all relate to PWA loans and grants for the establishment of competing municipal plants. Like the testimony they show that whatever may have been the theory of the statute yet, as actually administered by PWA in the case of loans and grants for the establishment of power plants, the test applied was that such plants would be established only where their rates would serve as a "Yardstick" to further the PWA policy to bring about the reduction of electric power rates, and that where the private utility whose rates would be affected agreed to put into effect rates as low or lower than the rates of the proposed plant the loan and grant was not made.

The petitioner introduced in evidence a number of orders, instructions and other documents issued by the Public Works Administration showing the PWA power plan. (R. 702-12). For example, Petitioner's Exhibit No. 49 is a letter dated November 8, 1933, from H. M. Waite, Deputy Administrator, to the PWA State Engineers. It contained the instruction to the State Engineers in regard

to handling applications for loans and grants for municipal light plants and, among other things, stated: "We are most anxious to set up around the country sound publicly owned utilities as yardsticks to determine the principle of whether or not communities can satisfy themselves and give lowered rates of electricity." (R. 576).

Mr. Clark Foreman was introduced as a witness for the respondents. He testified that he became Director of the Power Division of the Public Works Administration on August 1, 1935, and that he had continued in that capacity. The loan and grant to Greenwood County had been made before he became connected with the Public Works Administration and he knew nothing about it of his own knowledge. He undertook to testify about several of the projects to which Mr. Vennard had referred in his testimony but he knew very little about them and, insofar as he was able to testify to facts, his testimony confirmed rather than contradicted the testimony of Mr. Vennard. For example: Mr. Vennard testified that in the case of Dowagiac, Mich., the application of that City for a loan and grant had been rejected when his company made a reduction in rates. Mr. Foreman testified that later the application was approved but it appeared that this was not done until after the City had made a further reduction in rates which Mr. Vennard's company had been unable to meet. (R. 605). The procedure therefore in the case of Dowagiac was in accordance with the usual procedure followed by PWA in establishing competing municipal power projects.

A letter from Mr. Foreman to Mr. John M. Wright, City Clerk of Eldon, Iowa, dated October 22, 1935, was introduced in evidence as Petitioner's Exhibit 74. (R. 702). It related to the application of the City of Eldon for a PWA loan and grant for a municipal light plant and was in line with the customary PWA power policy.

Upon the original hearing Judge Watkins found that it was the declared policy of the PWA in making appropriations for municipally owned power projects such as the Buzzard Roost that the enterprise so aided should sell power at rates below the rates of the privately owned utility "thereby in effect constituting the rates of the municipally owned project a yardstick to regulate and bring about a reduction of the rates of the priyately owned utility." (R. 122).

On the retrial Judge Glenn found that in making the allotment to Greenwood County and in entering into the contract with the County the Administrator had no purpose other than that set out in the Act of Congress and that the policy of the Public Works Administration is correctly set out in the Administrator's report to the United States Senate, Respondents Exhibit 70. (R. 788).

When this finding is read in the light of Judge Glenn's opinion on this feature of the case it will be seen that the finding is based upon a supposed change in the power plan of the Administrator subsequent to the approval of the instant project and the allotment of funds for its construction. This is shown by the following extract from the opinion of Judge Glenn:

> "This evidence does tend to show two things. In the first place it tends to show that certain agents of the Administrator as well as the Administrator himself were at first very bold in the statement of the criteria they used in approving certain projects and denying others. It does support the contention that the criterion generally used was whether or not it was necessary to build a new competitive plant in order to force down the rates in a given community.
>
> "In the second place as testified by the Administrator himself in Spartanburg before Judge Watkins (evidence which under stipulation is now before this Court as original evidence), there was a gradual

recognition that the continued use of such a plan or scheme would endanger the constitutionality, of the whole program. We might as well be frank about it, for it is clear that such decisions as Judge Watkins' original decision in this case and the opinion of the Circuit Court of Appeals in the Coeur d'Alene case created doubts in the Administrator's own mind as to the wisdom of going too far into the rate question. Repudiation of the original position is abundantly evidenced. To name the major pieces of evidence is simply to remind ourselves of the following:

A. The frank changes in the contracts;

B. The appearance and testimony of Mr. Ickes himself on the rehearing of this Duke case;

C. The restriction of the authority of the Electric Board of Review;

D. The rebuke given to its members;

E. Its final abolition and the memoranda repudiating the authority to make certain statements which had been made by this Board.

We mention all of this because it is plain that there was on original plan to allocate funds for competitive municipal projects largely on the basis of lowering the rates in a given community. If the existing utility lowered the rates voluntarily and was rendering adequate service there would be no need to build a competitive, duplicate plant. Regardless of its effect on the final decision of the case we think that the evidence in this regard is admissible and that it shows exactly what the plaintiff contends that it shows." (R. 773-4).

The foregoing is a clearcut statement by Judge Glenn that at the time of the authorization of the construction of the Buzzard Roost project as a federal public works project, and the allotment of funds for its construction, the lowering of power rates was the controlling considera-

tion on which the action of the Federal Administrator was based. We submit that the validity of the Administrator's action must be determined by the considerations which controlled that action at the time the action was taken and that any subsequent change in the Administrator's power plan or policy would not be material as it could have no retroactive effect upon the validity of his action in this case. In other words, the supposed change in the PWA policy could have no bearing whatever upon the action in the instant case which took place long prior to the supposed change.

Each of the pieces of evidence to which Judge Glenn referred as indicating a repudiation or change of the Administrator's original plan related to matters which occurred subsequent to the allotment of federal funds for the construction of this project, so that even if they did indicate a change of policy such change would be immaterial in passing upon the legality of the allotment. As a matter of fact an examination of the evidence to which Judge Glenn refers will show that it does not bear out the conclusion that there was any change in the Administrator's policy; and the Administrator himself repeatedly testified that there had been no such change (R. 656, 664). Judge Soper correctly summed up this phase of the case as follows:

> "It is true that since the decision of Judge Watkins in the court below, 10 F. Supp. 854, 12 F. Supp. 70, and the decision in Arkansas-Missouri Power Co. v. City of Kennett, 78 F. (2d) 911, which pointed out the illegality involved in the practices of the Administrator, an attempt has been made to repudiate the public statements concerning the policies of the Administration which had been frequently and publicly made by subordinate officials; but these statements conformed so closely to the announcements of the Administrator that the attempt to abandon them

amounts to little more than an expression of regret that what had been so widely proclaimed as a praiseworthy public policy had become a source of danger to the establishment of municipal power projects. The District Judge found that there was in fact a change in the policy of the Administrator after he became doubtful of the validity of his prior acts, but so far as the proposal of Greenwood County is concerned, there was no change that affects the finding of fact that it was approved because it met the requirement that it would bring down the rates of the established local utility." (R. 875-6).

For example, Respondents introduced in evidence a letter written by the Administrator to the Mayor of Coeur d'Alene, Idaho, in March, 1936, in which the Administrator undertook to explain his action in that case with reference to power rates and in which, among other things, in speaking of the attitude which had been manifested in the letters and telegrams in reference to the rates and service of the Washington Water Power Company, he said: "I reached the conclusion several months ago that that attitude was entirely unjustified and have completely repudiated and abandoned it." (R. 718).

The letter was a hearsay statement and manifestly a self-serving declaration in the nature of a legal argument. It was clearly inadmissible and should have been excluded on the objection of petitioner. (R. 640, 831). But in any event the letter confirms rather than weakens the position of petitioner as it is a clear acknowledgment of the fact that at the time of the making of the loan and grant to Greenwood County the Public Works Administration was pursuing the policy of making such loans and grants only when they would bring about a reduction of local electric power rates.

On the record now before the Court the conclusion that the lowering of rates was the controlling factor in the

making of the loan and grant is in no way dependent upon the testimony of Mr. Rose alone. While Secretary Ickes did undertake to repudiate Mr. Rose's authority to speak for PWA on questions of policy, yet he did not deny Mr. Rose's testimony on the questions of fact about which he testified; and Mr. Rose's testimony is now confirmed by the testimony of Messrs. Post, Vennard, Byerley and Carter, and by their correspondence, and the correspondence of Messrs. Kennedy and Cary with PWA.

Secretary Ickes admitted that Mr. Rose was one of the engineers who had investigated the Duke rates for PWA. (R. 654). He testified that the investigation led him to believe that the Duke rates were excessive and that he still considered them excessive. (R 654, 655, 660, 662-3).

He further testified that the government, "under its PWA program has been advancing against" certain utility interests whose rates were considered excessive and that the Duke Power is one of those interests. (R. 660). The PWA advance is, of course, by way of making loans and grants for the establishment of competing municipal plants, the effect of which would be to lower rates and to control competitive rates. Secretary Ickes made this abundantly clear in his testimony.

He said, among other things, "We have always given the private utility an opportunity to meet the city's proposed rates, and, if this is done, the city is afforded a second chance to lower still further its anticipated charges." (R. 661). He testified that the yardsticks set up by PWA "have caused private utilities to adjust their rates downward," and that the accomplishments of PWA have saved to consumers millions of dollars "through the lowering of rates by private utilities to meet the charges proposed by applicants for public power projects" (R. 663); that the "rejection and withdrawal of some of the 200 appli-

cations that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant." (R. 663).

Counsel for respondents argue that the testimony given by the Administrator on the cross-examination consisted largely of statements read to him from a book which he had published. They argue that the book was written for public consumption and should not be taken too seriously. But Mr. Ickes, himself, testified that the statements in the book were correct and did correctly set forth the power policy of the Public Works Administration as applied to the use of federal funds for the establishment of municipal power projects. He further stated that there had been no change in that policy since the book was written. He, therefore, expressly adopted those statements and made them a part of his testimony in this case, and the testimony of Messrs. Post, Vennard, Byerly and Carter shows that the practice outlined in the Administrator's book was invariably followed.

II.

The evidence showing that the loan and grant in question was made as a part of the general plan to lower power rates was admissible.

The District Court admitted evidence relating to acts of PWA officials in dealing with other applications for loans and grants for the establishment of similar municipal power projects in competition with privately owned utilities and to letters written and statements made by such officials in the course of their dealings with such applications.

Respondents objected to this evidence upon the ground that it was irrelevant in that it related to other projects than the one involved in this suit.

The petitioner contends that it was the policy and general plan of the Public Works Administration to use the funds placed at its disposal by Title II of the National Industrial Recovery Act, so far as concerns the establishment of municipal power plants, so as to lower power rates, and that the loan and grant in question was made pursuant to this plan because petitioner's rates were considered excessive. It was therefore pertinent and material for petitioner to show the existence of such a plan.

The evidence introduced did, of course, refer to other municipal power projects, but these projects were not unrelated to the projects involved in this suit. They were all connected as parts of the same general plan, directed to the common end of lowering rates, and what was done in connection with applications for the establishment of other similar projects for the accomplishment of this end is of strong probative value in support of petitioner's contention in this case.

In Wigmore on Evidence (1904), § 102, the general principle involved is stated as follows:

> "The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out. The existence of the plan is always used in daily life as the basis of an inference to the act planned."

And in Sec. 104 the author says:

> "There is no situation in which a design to do an act would be irrelevant to show the doing of the act."

The existence of the PWA plan to lower rates has a special probative value in the instant case when taken in connection with the testimony of the Administrator that he considered petitioner's rates excessive and in connection with the testimony of Mr. Rose that the loan and grant

was made because petitioner's rates were considered excessive.

The existence of the plan being relevant to the case it was competent to prove its existence not only by statements of the PWA officials but by their acts and conduct in other similar cases in which the plan was carried out.

In Wigmore on Evidence, Sec. 103, it is stated:

> "The design or plan being assumed to be relevant, a common source of evidencing it is the conduct of the person, i.e., not express assertions of it but conduct circumstantially indicating it."

The rule, as stated by Wigmore, has been uniformly followed and applied by the Courts, U. S. v. Milwaukee Refrigerator Transit Co., 142 Fed. 247; National Novelty Import Co. v. Ellis, (Ark.) 220 S. W. 467; Hill v. Ansted National Bank, (W. Va.) 123 S. E. 417.

The respondents objected to the evidence on the further ground that the officials of PWA to whose acts and statements the evidence related had no authority to act for PWA or to make these statements.

This ground of objection, is, we think, equally untenable. The PWA officials in the transactions to which the evidence related were acting in the line of their duty. Most, if not all, of the letters, telegrams, and other wirtten statements which were introducted in evidence by petitioner were produced by counsel for the Administrator from the files of the records of the Public Works Administration in response to petitioner's notice to produce the same.

Col. Henry T. Hunt was Chairman of the Electric Power Board of Review. It was to this Board that the Administrator referred the Greenwood County application when

the petitioner's protest was filed (R. 463); and it was in response to the recommendation of this Board, as a result of the protest, that the allotment was increased. (R. 465). It was also to this Board that the Administrator referred the protest of the Washington Water Power Company against the allotment to the City of Coeur d'Alene. Attention has already been called to the Administrator's telegram to Mr. Post, President of that company, that if his company would place in effect a rate reduction equal to or greater than that of the City of Coeur d'Alene the Electric Power Board of Review would consider further the City's application for a loan and grant.

The transactions shown by the evidence related not merely to a few applications but to applications from almost every part of the United States. This fact, we submit, shows that the transactions in question must have taken place with the knowledge, acquiescence, and approval of the Administrator. Columbia Knickerbocker Trust Co. v. Abbott, 247 Fed. 833; Dierkes v. Hauxhurst Land Co., 79 Atl. 361 (N. J.); Moore v. Atlantic Coast Line Railroad Co., 135 S. E. 473 (S. C.) The record shows that in several cases, at least, including the instant case, Col. Hunt and the Electric Power Board of Review were acting not only with the knowledge but under specific direction of the Administrator. That those officials and representatives were in fact acting in accordance with the PWA power plan is shown by the fact that their actions and statements were in strict conformity with that plan as outlined and described by the Administrator in his book, which he testified correctly described that plan.

III.

Title II of the National Industrial Recovery Act properly construed does not authorize the action of the Public Works Administrator in this case.

The necessity of so construing an act of Congress as to prevent an impingement upon matters of local or state concern is strikingly illustrated by the recent case of National Labor Relations Board v. Jones and Laughlin Steel Co., 81 L. Ed. 563. In that case the court construed and limited the application of the National Labor Relations Act of 1935 so as to exclude any invasion of the reserved powers of the states over their local concerns. The Court said that unless so construed and limited in its application—

> "the act would necessarily fall by reason of the limitation upon the Federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 549, 550, 554, 79 L. Ed. 1570, 1590, 1592, 55 S. Ct. 837, 97 A. L. R. 947. The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system. Ibid."

Congress appropriated funds placed at the Administrator's disposal by Title II of the National Industrial Recovery Act for the purpose of relieving unemployment and provided for the creation of the Public Works Administration as an administrative agency to carry out that purpose. For the Administrator to use the funds thus placed at his disposal for the accomplishment of a purpose alto-

gether unrelated to the statutory purpose is wholly unauthorized.

Title II of the National Industrial Recovery Act first directs that the Administrator prepare a comprehensive program of public works. The Act then authorizes the Administrator to construct, finance, or aid in the construction or financing, of any project included in the program so prepared. The Administrator may make grants to states, municipalities and other public bodies up to 30% of the cost of labor and materials for the construction of any such project. The Act specifies that the fund at the Administrator's disposal shall be used "with a view to increasing employment quickly." The authority given the Administrator is restricted to this purpose and projects can properly be selected upon this basis alone. There is no authority given the Administrator to use the funds at his disposal for the purpose of reducing local electric rates and in so doing the Administrator went entirely outside of and exceeded the authority which had been given him.

The respondents argue that the petitioner's contention as to the PWA plan to lower rates goes only to the question of the personal motive of the Administrator in making this particular loan and grant and that official action which is otherwise valid is not rendered invalid by the personal intent or motive of the official performing the act. No such question, however, is here presented. The issue here presented relates not to whether the motives and purposes of the Administrator are good or bad, not to whether his action is prompted by any improper or oblique motive, not to a particular purpose or motive in one or more isolated cases, not to a casual or sporadic purpose; but to a purpose which is being followed pursuant to a general policy and fixed program designed to achieve certain definite ends. And the question is whether this policy and program is lawful; whether the achievement of these ends is with-

in the power of the Federal Government. And that it is the right and duty of the Courts to inquire into and determine a question of this character has been repeatedly decided, adversely to respondents' contention and contrary to the ruling of the court below.

In United States v. Butler, 297 U. S. 1, 68:

> "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted." Citing M'Culloch v. Md., 4 Wheat. 316, 423; Linder v. U. S., 268 U. S. 5, 17; Gibbons v. Ogden, 9 Wheat. 1, 199; Veazie Bank v. Fenno, 8 Wall. 533, 541; Bailey v. Drexel Furniture Co., 259 U. S. 20; Hill v. Wallace, 259 U. S. 44; United States v. Constantine, 296 U. S. 287.

In that case it was argued that the tax should be sustained under the admitted power of the Federal Government to tax, but the court said:

> "It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end." (Loc. cit. 68).

And further:

> "The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible." (Loc. ct. 69).

In Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 434, the court said:

> "* * * we assume in favor of the defendants that the state has the power and constitutional right arbitrarily to exclude the plaintiff without other reason

than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

The respondents contend that the PWA had no purpose to affect power rates. We submit, however, that the record demonstrates that the reduction of power rates was not simply an incidental effect of the PWA power program but was its direct objective and was the *sine qua non* of the instant loan and grant.

Respondents contend that the adoption by the Administrator of the rate test which they described as a "non-statutory criterion" did not render illegal the making of loans and grants which would in fact have the effect of relieving unemployment. Their argument is that a loan and grant which will have the effect or relieving unemployment and thus accomplishing the statutory purpose is in compliance with the statute and therefore lawful no matter what other factors the Administrator may have taken into consideration in determining to make such a loan and grant. They argue that since the loan and grant in question will have the effect of giving employment the Administrator "is doing precisely what the statute authorizes him to do," and that the fact that he "is acting pursuant to an additional 'non-statutory criterion'" does not make his action unlawful.

We may concede for the sake of the argument that the Administrator might apply some "non-statutory criteria" which would not make his action unlawful. But the "non-statutory criterion" here involved is not of that character. In making the lowering of rates the controlling factor in the approval or disapproval of loans and grants for the establishment of municipal power plants the Administrator

is acting entirely beyond the authority delegated to him. He is not merely applying criteria or standards which the statute does not require him to apply, but criteria or standards which it is unlawful for him to apply, both under the statute and under the Constitution.

Respondents construe the statute as if Congress had delegated to the Public Works Administration power to use the funds placed at its disposal not only for the purpose of relieving unemployment but for the accomplishment of *any other purpose* considered beneficial to the public interest. Had the statute been so written, it would have been unconstitutional as an invalid delegation of legislative power and so to construe and apply it would render it likewise unconstitutional. Had Congress provided that the funds placed at the Administrator's disposal should be spent not only "with a view to increasing employment," but also with a view to lowering electric power rates and that no loan and grant for the establishment of a municipal power project should be made unless it accomplished both purposes, the statute would have been unconstitutional as exceeding any power vested in Congress and as invading matters reserved to the states. Yet the administrative application and construction of the statute as applied to applications for loans and grants for the establishment of municipal power plants give the statute the same effect as if Congress had so provided.

Here there is no evidence in the record of what effect, if any, the loan and grant would have in relieving unemployment. But even if we concede that one of the purposes of the Administrator is the relief of unemployment yet since he is also acting to reduce rates, which admittedly he has no authority to do, and since his action will cause special injury to the petitioner, as admittedly it will, clearly his action is unlawful and the petitioner is entitled to have it restrained.

Respondents cited in the Court below a number of cases holding that the Courts, in reviewing an exercise of executive or administrative power, will not substitute their judgment for the judgment of the executive or administrative official whose action is under review. No such question is here involved. The question here is not whether the Court will substitute its judgment for the judgment of the Administrator, but whether the Administrator has acted outside the scope of the authority conferred on him. The statute conferred on the Administrator no authority to lower and control power rates or to regulate any other form of industry. No authority has been cited, and none can be cited, holding that an executive or administrative official charged with the duty of spending money for the national purpose of relieving unemployment may use the funds placed at his disposal to regulate any form of loca industry, and thus to invade matters reserved to the states.

The principle that an official will be enjoined from acting outside his authority has been frequently invoked and applies as well to official action of an executive character as to official action of a quasi-judicial or quasi-legislative character. Philadelphia Co. v. Stimson, 223 U. S. 605, at page 620, and cases cited.

In Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, the plaintiff contended that the Interstate Commerce Commission had exceeded the power conferred upon it to determine whether a rate was just and reasonable, in that the Commission had assumed that it had power to fix rates upon its conception of public policy as to what was best for the shippers. The plaintiff further contended that the court would not be controlled by the mere form of an order of the Commission which superficially appeared to conform to the Commission's proper authority, but that the court would determine the validity of the order by what the Commission in fact did. Having

examined the Commission's action in this light the court said that "the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies resist the order plainly manifested"—namely, the power to fix rates to protect the lumber interests to which the rates applied.

In A. T. & S. F. Rwy. Co. v. I. C. C., 190 Fed. 591, the rate on lemons moving from California and from western points to the East was fixed by the Commission on the assumption that it had the power "so to adjust railroad rates as would give to the American Industry protection against foreign competition." The court held that the power delegated to the Commission to fix rates "does not confer absolute or arbitrary power to act on any considerations which the Commission may deem best for the public, the shipper or the carrier. Its order must be based on transportation considerations." The court after analyzing the order held that the transportation considerations had been "a small, if not entirely insignificant, factor in the case" and that since the order was "based primarily on the assumed authority to protect the industry against foreign competition it must be held void as beyond the powers delegated to the Commission."

In Anchor Coal Co. v. United States, 25 Fed. (2d) 462, there was involved the validity of an order of the Interstate Commerce Commission directing carriers to cancel certain rate schedules which they had filed, reducing by 20¢ per ton the freight rate on "lake cargo" coal from the southern field to lake ports. The suit was brought by coal producers engaged in mining and shipping coal from the southern field to set aside the order, on the grounds that one of the factors taken into consideration by the Commission in entering the order was the equalization of the advantages which these producers had over their competitors in the northern field, that the ac-

tion of the Commission was based upon industrial conditions and hence constituted not merely a regulation of rates but a regulation of industrial conditions, and that the order was therefore in excess of the powers conferred on the Commission and void.

The Court held that, in considering the validity of the order, it was the duty of the Court *to go behind the formal order and to scrutinize the record for the purpose of ascertaining the real nature and character of the Commission's action.*

It said:

> "To understand, however, exactly what the power is which the Commission has assumed to exercise, it is necessary that *we go behind its merely formal conclusion that rates are reasonable or unreasonable, and ascertain exactly what it is that it has done, and upon what facts and upon the application of what principles it has arrived at its conclusions.* This it is our duty to do. Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; U. S. v. N. Y. Central Railroad, 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470. And, in the performance of this duty, it is necessary that we analyze not only the report of the Commission accompanying the order whose enforcement we are asked to enjoin, but also the reports made in 1925 and 1927 with regard to the reductions of rates from the Northern field, in the latter of which the differential between the two fields was increased from 25 to 45 cents." (Italics supplied).

After analyzing the record the Court said that it was manifest that the order of the Commission was a—

> *"regulation of industrial conditions under the guise of regulating rates.* It means nothing more nor less than that, because one community is able to produce coal more cheaply than another, and thereby get a large share of the business which has been going to the other, even though paying a considerable differential in freight, the Commission is placing upon it a handicap by increasing the

differential in rates and thereby equalizing the advantage which it has in a low cost of production. It matters not what this may be called, it is in essence a regulation of industrial conditions through manipulation of rates." (Italics supplied).

It said further:

"We think that the enforcement of the order here complained of should be enjoined: (1) *Because the Commission exceeded its powers, in that its action was based, in part, at least,* upon industrial conditions, and was essentially an effort to equalize industrial conditions or offset economic advantages through adjustment of rates." (Italics supplied).

It further said:

"If we are correct in our analysis of the reports of the Commission, there can be no doubt that it exceeded its powers.

"As pointed out above, for the Commission to fix rates upon such a basis is for it to assume the task of equalizing industrial conditions through rate adjustments. We do not think that Congress could give such power to the Commission. Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A.L.R. 649, Ann. Cas. 1918E, 724. We are perfectly certain that it has not attempted to do so."

Referring to the language of the Hoch-Smith Resolution under which the Commission purported to make the order in question, "to the effect that the conditions which prevail in industry should be considered in adjusting freight rates, to the end that commodities may freely move," the Court refused to construe this language as conferring the authority, which the Commission had claimed the power to exercise. On the contrary, it said:

"Congress certainly did not intend by this language to create in the Commission *an economic dictatorship* over the various sections of the country, with power to kill or make alive. If the Commission has the right in a

rate adjustment to consider the shift in traffic to a community already paying a higher rate, *and act upon it as one of the factors* in still further widening the rate differential, its power to control the economic development of the country is practically unlimited. The shift in cotton manufacturing, in fruit growing, in furniture manufacturing, in short in every branch of industry, will become a matter for consideration by the Commission; for all depend upon freight rates, * * * and all experience periods when there are shifts of traffic from one section to another, due to varying industrial conditions. *We feel perfectly certain that Congress did not intend to vest such power in the Commission.* (Italics supplied).

It will be noted that in the Anchor Coal Company case the order of the Commission was set aside, not on the ground that it was based entirely on the regulation of industrial conditions, but "because the Commission exceeded its powers, in that its action was *based, in part, at least,* upon industrial conditions." So in the case at bar the Administrator's action in approving the loan and grant would be void, even if it were based only in part on the regulation of electric power rates, but the evidence shows that the regulation of rates was in fact the controlling factor in determining the Administrator's action.

In reference to the action of the Administrator in this case Judge Soper said:

> "Possessing the conviction that the rates approved by State authority were too high, he determined to use his power as an official of the national government to reduce them; and in carrying his purpose into effect he stepped across the line, went beyond the power conferred upon him by Congress and invaded the reserved powers of the states. If the National Industrial Recovery Act had provided that the power of the Administrator to make loans or grants to municipalities for the establishment of power plants should be exercised so as to reduce by competition the rates of private utilities approved by state authority, such a provision would surely have been unconstitutional. The administrator proceeded as of such a provision were contained in the statute." (R. 876-7).

It is a familiar principle that, although the courts will not review the discretion of an administrative official, exercised within the scope of his authority, they will grant relief if he applies rules and principles which are not authorized by the statute under which he purports to act. For instance, in St. Louis O'Fallon Rwy. Co. v. United States, 279 U. S. 461, the Interstate Commerce Commission followed a principle of valuation not in accord with the statute. Although the Commission had vast discretion in the matter of valuation it was held that its order must be set aside. In American Bank & Trust Co. v. Federal Reserve Bank, 256 U. S. 350, it was held that the admitted power of the Federal Reserve Bank to present checks to the drawee bank for payment could not be used, pursuant to a policy established by the Federal Reserve Bank, for the purpose of compelling the drawee banks to join the Federal Reserve System. In this connection we also refer to the case of Work v. Louisiana, 269 U. S. 200, Herkness v. Irion, 278 U. S. 92; Florida East Coast Rwy. Co. v. United States, 234 U. S. 167; and Central Railway Co. v. United States, 257 U. S. 247.

The use of the spending power of the Federal Government to control power rates is merely "an entering wedge." The principle for which counsel for the Administrator contend, when once established, would authorize the use of the spending power for the control of any and all other forms of industry which it might be considered advisable to control. The fact that the control of power rates is here being exercised under a statute appropriating money for the avowed national purpose of relieving unemployment is wholly immaterial if the contentions of counsel for the Administrator be accepted. For if money appropriated for such a statutory purpose may be used for any other purpose deemed desirable, or if a party specially injured has no standing in Court to question the validity of such a use of the spending power, then there is hardly any form of industrial activity which cannot be sub-

jected to federal regulation and control. To say that we are faced with such a problem is not an exaggeration in view of the increased use of the federal spending power and the claims being made for its scope.

A construction of the statute which would deny to the Administrator the powers claimed in his behalf in this case would not impair the federal spending power in its use for any legitimate national purpose. To construe the statute, however, so as to uphold the contentions of counsel for the Administrator would, to say the least, raise grave questions as to the constitutionality of the statute as so construed and applied. And the rule is well settled that "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U. S. 394, 401; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 422; Texas v. Eastern Texas R. Co., 258 U. S. 204, 217; The Abby Dodge, 223 U. S. 166, 175; United States ex rel. Atty. Gen. v. Delaware & H. Co., 213 U. S. 366, 407; Knights Templars' & M. Life Indem. Co. v. Jarman, 187 U. S. 197, 205; McCullough v. Virginia, 172 U. S. 102; United States v. Coombs, 12 Pet. 72, 76.

IV.

The new contract of November 30, 1935, entered into in substitution for the prior contract of December 8, 1934, did not cure the illegality of the original allotment of federal funds for the construction of the Buzzard Roost project, nor did it otherwise make any material change in the case.

The contract of December 8, 1934, in existence between the Administrator and Greenwood County at the time of the entry of the original decree of injunction provided that the County should adopt a rate resolution satisfactory to the Administrator. The new contract of November 30,

1935, eliminated this provision. But rates satisfactory to the PWA had already been adopted by the County, contracts for the sale of power from the project had already been made with the petitioner's customers on the basis of these rates and no change was made in either the rates or the contracts following the change in the loan and grant agreement. The change in the contract, therefore, was a purely formal change made by a scrivener and the factual situation remains wholly unaffected. No change was made in the allotment of federal funds, in the project, in its rates, or in the effect that the allotment would have in reducing power rates or in the injury that would be done to petitioner. (R. 563, 688, 691).

There was no new application by the County to the Public Works Administration and no new resolution or allotment of federal funds by PWA.

The new contract was based on the original PWA resolution of June 20, 1934, whereby the project was included in the so-called comprehensive program of public works and funds allotted for its construction as a public works project. The new contract, like the prior contract, was merely a routine detail for the carrying out of the original allotment or resolution; each of the contracts simply providing for the disbursement of the funds allotted by the resolution.

The resolution was the vital and controlling act on which the validity of the allotment depends. If as we have heretofore argued the original allotment was illegal, then the contract which is merely in aid of the allotment could not cure the illegality of the allotment but is affected by the same illegality and subject to the same infirmities as the resolution itself. Horbach v. Coyle, 2 Fed. (2d) 702, 707; 6 R. C. L. p. 820; 13 C J. 511.

The correctness of the following statement, although taken from the dissenting opinion, is not questioned:

> "The original contract of December 8, 1934, was revised on November 30, 1935, so as to include a paragraph denying to the Administrator and the Government the right or power to govern the rates to be fixed or charged for the services afforded by the project, excepting such rights as the Government might have as a holder of the municipal revenue bonds; but no new application for the loan and grant was made by the county, no new resolution of approval of the project by the Public Works Administration was given, and no change was made in the rates to be charged by the projected plant which had been adopted prior to the execution of the first contract and had received the approval of the Administrator. In fact, the county adopted a new resolution on December 6, 1935, by which the original rates were confirmed. The change in the contract was obviously made to meet, if possible, the legal objection that had been raised; but no change was made in the unauthorized and invalid condition upon which the proposal had been approved." (R. 876).

The resolution of June 20, 1934, approving the County's application of November 16, 1933, provided that the Administrator "include in the comprehensive program a project for the construction of an hydro-electric plant comprising an earthen dam across Saluda River, * * * by Greenwood County, South Carolina, substantially in accord with Docket No. 3972 and allot a sum not to exceed $2,767,000.00 for the purpose of aiding by way of a loan and grant the financing of such project subject to the execution of a contract satisfactory to the Administrator between the United States of America and Greenwood County." (R. 464). This resolution was later reaffirmed

and the amount of the allotment increased to $2,852,000.00 by similar resolution dated November 7, 1934. (R. 46-5).

The Administrator's authority to use federal funds for the construction of the project is limited to the project approved by the resolution above quoted and depends upon that resolution. As we have heretofore pointed out, the statute under which the Administrator purported to act directed that he prepare a "comprehensive program of public works" and authorized him to allot funds for the construction only of projects included in such program. Except as the Buzzard Roost project has been included in such a program the Administrator would be without even colorable authority to use federal funds for its construction. And the action upon which the Administrator relies for the inclusion of this project in the so-called comprehensive program is the resolution above quoted. It is the source of whatever authority the Administrator claims to have to use federal funds for the Buzzard Roost project. The subsequent contracts were merely details connected with the distribution of the allotted funds.

It is true that the contract of November 30, 1935, provides, in effect, that the Administrator shall have no rights in respect to rates except those of a bondholder. Laying to one side the obvious purpose for which these provisions were inserted, we submit, that they must be read in connection with the provision of the South Carolina Act under which the bonds would be issued. This Act (Act No. 299 of the Acts of 1933, § 29) expressly provides that the rates to be charged "shall not be subject to supervision or regulation by any state bureau, board, commission or other like instrumentality or agency thereof." Under the Act the only control imposed upon the County with respect to rates is the power given the holder of the bonds to require that the rates be so fixed as to be sufficient to liquidate the bonds. Under the PWA plan of financing this

plant however there is no possibility that the holder of the bonds would ever take any action interfering with the plan to maintain rates substantially below the rates of the petitioner. The maintenance of such rates is a necessary condition of the method of financing, even apart from the federal subsidy, for the bonds being payable solely out of the revenues of the plant the rates must be kept below petitioner's rates else there would be no revenue out of which to pay any part of the principal or interest. (R. 560-1, 696, 643).

It would be impossible to contrive a yardstick more effective in its consequences. No matter what reductions the petitioner might make in its rates, the project would always go still lower. Therefore the provision as to rates incorporated in the earlier contract was wholly unnecessary to effectuate the PWA policy of lowering rates, because under the circumstances the loan and grant itself, as made in this case, would necessarily have that effect.

In many cases the objective of the PWA plan was accomplished without the construction of any municipal plant at all and in such cases there was, of course, no contract—and manifestly no relief of unemployment. This occurred when the private utility agreed to put into effect a lower rate than the rate of the proposed municipal plant. This working of the plan is demonstrated by the Administrator in his testimony as follows:

> "In my book I refer to the accomplishments of PWA and state that it has saved to consumers millions of dollars through the lowering of rates by private utilities to meet the charges proposed by applicants for public power projects.'
>
> "I say 'the rejection or withdrawal of some of the 200 applications that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant.'

> "Then on the next page, I say: 'these "Yardsticks" provided by both municipal and federal enterprises are so valuable that they alone would warrant PWA's expenditures for power undertakings. The municipal projects have caused private utilities to adjust their rates downward in wide areas and the federal projects have brought about rate adjustments over still larger expanses of territory.' This quotation correctly states the facts." (R. 663).

It is significant that the sole ground upon which the Federal Administrator requested the remand of this case for a retrial was the substitution of the contract of November 30, 1935, for the prior contract of December 8, 1934, the motion of the Administrator alleging:

> "The terms and conditions which were contained in the original contract of December 8, 1934, and which were held by the District Court to have been in excess of the power and authority of Greenwood County under the laws of South Carolina are not contained in the new contract of November 30, 1934." (R. 493).

This allegation is wholly incorrect. The Administrator made no effort on the retrial to support it and it is insupportable. Judge Watkins did not hold the terms and conditions of the contract of December 8, 1934, to be in excess of the authority of the County under the laws of South Carolina. On the contrary he expressly held that all questions of state law had been conclusively settled in favor of Greenwood County by the decision of the Supreme Court of South Carolina in the case of Park v. Greenwood County, 174 S. C. 35. (R. 125). Judge Watkins' decision, on which the decree of injunction was based, was placed solely on federal grounds. (R. 117-152).

V.

If Title II of the National Industrial Recovery Act be construed to authorize the action of the Public Works Administrator herein it is unconstitutional in that it invades powers and governs matters reserved to the states in violation of the 10th Amendment to the United States Constitution.

Under a preceeding division of this brief, we have contended that the Act itself did not authorize the action of the Administrator in this case. If, however, it be held that the Act is broad enough to authorize such action of the Administrator then we contend that the Act itself is unconstitutional.

In *Collins v. New Hampshire*, 171 U. S. 30, 33-33; 43 L. Ed. 60, 61, the Court said:

> "The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. *In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.* Henderson v. Mayor of New York (Henderson v. Wickham), 92 U. S. 259, (23:543); Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, at 462, (30:237, 241)." (Italics supplied).

In *Hammer v. Dagenhart*, 247 U. S. 251, 275, 62 L. Ed. 1101, 1107:

> *"A statute must be judged by its natural and reasonable effect.* Collins v. New Hampshire, 171 U. S. 30, 33, 34, 43 L. Ed. 60-62, 18 Sup. Ct. Rep. 768. The control by Congress over interstate commerce cannot authorize the exercise of authority not intrusted to it by the Constitution. Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 560, 58 L. Ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The maintenance of the authority of the states over matters purely local is as essential to the preser-

vation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. Lane County v. Oregon, 7 Wall. 71, 76, 19 L. Ed. 101, 104. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. New York v. Miln, 11 Pet. 102, 139, 9 L. Ed. 648, 662; Slaughter-House Cases, 16 Wall. 36, 63, 21 L. Ed. 394, 404." (Italics supplied).

We think it clear that the evidence now before the Court brings the case squarely within the principle of these authorities. It shows that according to the criteria, standards and tests adopted and applied by PWA no application for a loan and grant of federal funds for the construction of a municipal power plant in competition with a privately owned utility was approved unless the rates of the proposed plant would be materially lower than the rates of the private utility with which it would compete; that where the privately owned utility agreed to put into effect rates at least as low, or lower, than the rates of the proposed municipal plant the application was not approved; and that these criteria and tests were adopted by PWA pursuant to its announced power plan to bring about the reduction of power rates, and to establish municipal plants only where their rates would serve as "yardsticks" in bringing about lower rates. In the light of this evidence it is impossible to obscure the fact that the proposed use of federal funds will operate to lower and control intrastate electric power rates, and will constitute an invasion by federal authority of a field of government activity expressly reserved to the States.

In *Hammer v. Dagenhart*, 247 U. S. 251, 276, 62 L. Ed. 1101, 1107, from which we have already quoted, the Court further said:

> "This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution."

In *United States v. Butler*, 297 U. S. 1, 80 L. Ed. 477, the Court while adopting Story's construction of the welfare clause in preference to Madison's more limited construction stressed the fact that "the adoption of the broader construction leaves the power to spend subject to limitations"; that it may only be exercised for a general not local, national not State, purpose. (297 U. S. 66-7). *And the Court expressly held that the federal spending power cannot lawfully be made the means of controlling matters of local concern, or of exercising powers reserved to the States.* (297 U. S. 68).

Mr. Justice Stone in his dissenting opinion said:

> "The power to tax and spend is not without Constitutional restraints. One restriction is that the purpose must be truly national. *Another is that it may not be used to coerce action left to state control.*" (297 U. S. 87). (Italics supplied).

For the federal spending power to be used so as to invade powers and perform the functions of the States would lead inevitably to the destruction of the federal balance between the general government and the States. A use of the federal spending power for such a purpose or, regardless of purpose, a use, which has that direct and necessary effect, is not a constitutional means of relieving unemployment.

The federal spending power like the other powers of the Federal Government must be exercised in the light of our dual system of government and our indestructible union of

indestructible states.* Story's Constitution, 3rd Ed., Sec. 416; U. S. v. Butler, 297 U. S. 1, 68. It must be exercised in a manner "consistent with the letter and spirit of the Constitution." McCulloch v. Maryland, 4 Wheat. 316, 421. And this prohibits any exercise of the power which would have the direct and necessary effect of invading the powers reserved to the States and impairing their separate existence and independent self-government. Kansas v. Colorado, 206 U. S. 46.

In *Franklin Township v. Tugwell*, 85 Fed. (2d) 208, 221, (which the government did not seek to have reviewed by this Court), the United States Circuit Court of Appeals for the District of Columbia, declared:

> "Thus we think it clear from the limitations placed upon the power of Congress to tax and spend for the general welfare that that power can never be used to destroy the federal balance established by the Constitution between the general government and the State, that that power may be exercised only within the limitations imposed by the Constitution, and not beyond, and that it cannot be directed to matters of local concern which belong exclusively to the States."

In *Carter v. Coal Company*, 298 U. S. 238, 295-6, 80 L. Ed. 1160, the Court said:

> "State powers can neither be appropriated on the one hand nor abdicated on the other. As this court said in Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227, 237, 'The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and

* This principle applies even more strictly to the federal spending power than to the other powers of the Federal Government, because the spending power, different from most of the other powers, involves only the power to spend, and, as Hamilton said does "not carry the power to do any other thing not authorized in the Constitution, either expressly or by implication." Hamilton's Works, (Const. Ed.), Vol. IV, p. 152.

the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' Every journey to a forbidden end begins with the first step; and the danger of such a step by the Federal Government in the direction of taking over the powers of the States is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified."

The question here is not whether the State of South Carolina has the right to adopt the policy, *as a State policy,* of establishing municipal power plants for the purpose of going into the power business in competition with private industry. The right of Greenwood County to engage in the proposed enterprise, notwithstanding the effect of the competition upon the business of petitioner, is not questioned. It may be conceded for present purposes—though it is not admitted—that the enterprise if established would be the business of the State and subject to its control. But the point, we submit, is not the right of the County to engage in the enterprise and to maintain it as a "yardstick," if it so desires; indeed, the decrees of Judge Watkins left the County entirely free to exercise this right and placed no obstacle in the way of the State's right to adopt and carry into effect such State policy with reference to power as it may see fit to adopt.

The petitioner complains not of State action but of federal action; not of lawful State regulation but of unlawful federal regulation; not of a State policy or program but of a federal policy and program, particularly of

that feature of it whereby privately owned utility companies are coerced into reducing their power rates. This is an end which cannot be achieved by the Federal Government by any means, because it is an end absolutely prohibited to that government. It cannot be achieved by employing, through an exercise of the spending power, rights which under the Constitution belong to the States alone and not to the Federal Government. It is no answer to say that the "yardstick" would be the County's "yardstick" when the very point at issue is whether the Federal Government may lawfully adopt, as a national power policy, a program for the establishment of such municipal "yardsticks" for the very purpose of reducing rates. In fact a part of the program, and one of its principal features, does not contemplate or result in the actual establishment of such "yardsticks" but coerces reductions in rates through the threat to subsidize their establishment. The fact that this federal regulation may be implemented by the purchased cooperation of the State subtracts nothing from its invalidity but merely makes the attempted encroachment on the principles involved stand out more clearly. There was do divergence of opinion in the Butler case on the principle that "the power to tax and spend is not without restraints"; and that one restriction is that "it may not be used to coerce action left to state control."

VI.

If Title II of the National Industrial Recovery Act, be construed to authorize the action of the Public Works Administrator herein, then the act is unconstitutional in that it is not within any power delegated to Congress by the General Welfare Clause, U. S. Constitution, Art. I, Sec. 8, Cl. 1, or by any other clause or provision of the U. S. Constitution.

The question here presented is whether the power of the Federal Government to levy taxes and to appropriate the revenues derived therefrom may lawfully be used to make an appropriation to a state, or to a political subdivision of a state, for the purpose of constructing a purely local public utility which as a matter of law could by no possibility serve any federal purpose. The appropriation would be made directly to Greenwood County, a political subdivision of the State of South Carolina. It is sought to be sustained on the ground that Greenwood County in expending the appropriation would employ in the construction of the plant persons who otherwise might remain unemployed, and would purchase materials and supplies from manufacturers who might employ such persons.

It cannot be denied that the construction of such a plant, apart from such incidental and collateral effect as its construction might have in relieving unemployment, is per se a matter of local, as distinguished from national, concern, and affects only the welfare of the state as distinguished from the welfare of the United States. It is a plain case of a State purpose. The cost of the construction of such a plant is a legitimate State expense and the power to levy taxes and to appropriate the revenues derived therefrom in order to defray such cost belongs to the several States and is expressly reserved to them and withheld from the Federal Government.

The proposition that the power of taxation and appropriation may only be exercised in furtherance of a public purpose will not be denied. Loan Association v. Topeka, 87 U. S. (20 Wall.) 655, 664; Parkersburg v. Brown, 106 U. S. 487; Cole v. City of La Grange, 113 U. S. 1; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 161; Green v. Frazier, 253 U. S. 233, 238; Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 251-2; Dodge v. Mission Township, (C. C. A. 8th), 107 Fed. 827; Lowell v. Boston, 111 Mass. 454. Nor can it be denied that the purpose must pertain to the government exercising the power. The federal power of taxation and appropriation may be exercised only for national purposes, and the like state power only for state purposes. What may be a public purpose of a State Government may not be a public purpose of the Federal Government; and to constitute a public purpose of the Federal Government it is not sufficient that the purpose be a public one from the standpoint of a State Government or of a municipality. Kohl v. United States, 91 U. S. 367; Cooley on Taxation 108; Hubbard v. Fitzsimmons, 57 Ohio State, 436; State ex rel. Owen, Attorney General, v. Donald, 160 Wis. 21, 151 N. W. 331, 365.

The construction of such a utility as the one proposed in this case, even so far as concerns the State of South Carolina, is a proprietary and not a governmental function. S. C. v. United States, 199 U. S. 437; Helvering v. Powers, 293 U. S. 214; United States v. California, 297 U. S. 175; Ohio v. Helvering, 292 U. S. 360; Los Angeles v. Los Angeles Gas Corporation, 251 U. S. 32. And certainly the construction of such a utility is not a public purpose of the Federal Government.

If an appropriation of federal funds to a state for such a purpose can be justified on the ground that the state's expenditure of the funds would have the effect of relieving

unemployment then it is difficult to imagine any appropriation of federal funds which could not be justified on some such similar ground, for if the relief of unemployment is a sufficient justification the relief of any other evil or undesirable conditions would do as well.

Here the benefits expected to arise from the expenditure by Greenwood County of the funds appropriated to it would be incidental to the exercise by the County, as a political subdivision of the state, of an admitted state power. If such incidental benefits justify federal appropriations to the states for the purpose of carrying out and performing purely state functions, then the federal government may make appropriations to states for the purpose of financing practically all state functions. There is scarcely any activity of the states, in the exercise of the powers reserved to them, which does not in a sense affect the general welfare in precisely the same way that the expenditure of these funds by the state would affect the general welfare by incidentally relieving unemployment. For example—and many examples might be cited—salaries and wages paid the state's officers increase the purchasing power of the nation, yet the number of officers and employees to be retained, the amount of their salaries and wages, and the payment thereof, are matters exclusively for the states.

There would also be precisely the same justification for any appropriation of federal funds, whether to an individual or to a private corporation, for any piece of construction work which would have the effect of relieving unemployment.

The importance of the principle involved is illustrated by the instant case. The necessary and inevitable effect of financing the establishment of the proposed plant, as a federal public works project, will be to lower and control

power rates in the territory in which the federally subsidized and financed plant will operate. By the use of federal funds, as here proposed, rates could be reduced to any desired level, dependent upon the amount of the federal subsidy and the plan of federal financing. If local power rates can be thus managed and the electric industry thus controlled, so also, in the same way, can the price of all other commodities be managed and all other lines of business controlled.

In *Cincinnati Soap Co. v. United States*, 57 Sup. Ct. 764, the question presented was whether an appropriation by Congress to the Treasury of the Philippine Islands was valid as a proper exercise of the federal spending power. The appropriation was upheld upon the ground that the Philippine Islands, as distinguished from a state of the Union, are a dependency of the United States; that the United States was under a moral obligation of the highest character to provide for the general welfare of the Philippine Islands; that such a moral obligation comes fairly within the term "debt" as used in the taxing clause authorizing Congress to levy taxes "to pay the debts of the United States"; and that the Federal Government may do for one of its dependencies whatever a state may do for itself or one of its political subdivisions, since over such a dependency the Federal Government possesses the sovereign powers of the general government plus the powers of a local or state government.

The opinion quoted with approval from United States v. Realty Company, 163 U. S. 427, as follows:

> "The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice,—when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the con-

science or the honor of an individual, although the debt could obtain no recognition in a court of law. * * * * Payments to individuals not of right, or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government, by virtue of acts of Congress appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error. The acts are referred to, not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of Congress since the adoption of the constitution."

The Court drew a clear distinction, however, between the power of Congress to make an appropriation to a dependency of the United States and the power of Congress to make an appropriation to one of the States of the Union.

On this point the Court said:

"It does not follow that because *a federal tax levied for the express purpose of paying the debts or providing for the welfare of a state might be invalid* (The Passenger Cases, 7 How. 283, 446) that such a tax for the uses of a territory or dependency would likewise be invalid. *A state,* except as the federal Constitution otherwise requires, *is supreme and independent. It has its own government, with full powers of taxation and full power to appropriate the revenues derived therefrom.* A dependency has no government but that of the United States, except in so far as the United States may permit. The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers

> of the general government plus the powers of a local or a state government in all cases where legislation is possible."

In the *Passenger Cases*, 7 How. 283, 446, (cited in the above quotation), the Court said:

> "Nor has Congress power to lay taxes to pay the debts of a state, nor to provide by taxation for its general welfare."

In *Gibbons v. Ogden*, 9 Wheat. 1, 199, Chief Justice Marshall said:

> "Congress is not empowered to tax for those purposes which are within the exclusive province of the states."

In *Cooley on Taxation*, at page 108, Judge Cooley said:

> "State expenses are not to be provided for by federal taxation."

In *Cloud v. Coleman*, 64 Ky. 548, 588, the Court said:

> "Congress may levy and collect taxes for legitimate purposes of the National Government but not for the purposes of state governments."

In his *Lectures on the Constitution*, Mr. Justice Miller, at page 247, said:

> "The United States being a limited form of government, one of the restrictions to which it is subject is in regard to its power to levy taxes. The states may levy them for a great many purposes for which Congress cannot, because to the States belong all the powers not delegated to Congress."

The principle that an appropriation of public funds cannot be justified because of its indirect, incidental or collateral effect is especially applicable to Federal appropriations in order to avoid converting the Federal Government into one of unlimited powers. Loan Association v. Topeka, 87 U. S. (20 Wall.) 655, 665; Parkersburg v. Brown, 106

U. S. 487; Cole v. City of LaGrange, 113 U. S. 1; Dodge v. Mission Township, (C. C. A. 8th) 107 Fed. 827; Lowell v. Boston, 111 Mass. 454, 460-1; Cooley on Taxation, 108; Schechter Corporation v. U. S., 295 U. S. 495, 546-8; United States v. Butler, et al, 297 U. S. 1; Township of Franklin v. Tugwell, 85 Fed. (2d) 208; National Labor Relations Board v. Jones & Laughlin S. Corporation, 81 L. Ed. 563.

Charles C. Steward Machine Co. v. Davis, 57 S. Ct. 883 and Helvering v. Davis, 57 S. Ct. 904, are not authorities in support of the constitutional validity of Title II of the National Industrial Recovery Act as construed to authorize the action of the Public Works Administrator herein and as applied to this case. In those cases this Court upheld the Social Security Act which by Title II provided for the payment of old-age benefits; by Title III for unemployment compensation; by Title VIII imposed old-age benefit taxes in the form of an income tax on employees and of an excise tax on employers; and by Title IX imposed unemployment excise taxes on employers.

In those cases the unemployment compensation and old-age benefits which the Court upheld as legitimate means of relieving unemployment were wholly and immediately directed to the solution of that problem. And there is nothing in the decisions or in the opinions of the Court to warrant the conclusion that Congress has the power to make an appropriation for the construction of a state or municipally owned utility, which would serve only a local purpose, merely because the expenditure involved in the construction thereof might have the effect of increasing employment. On the contrary, the Court expressly stated that, "The line must still be drawn between one welfare and another, between particular and general"; that is to say,

between the welfare of the States and the welfare of the United States. Helvering v. Davis, supra.

In view of the statement in the unanimous opinion of the Court in the Cincinnati Soap Company case, drawing a distinction between the power of Congress to make an appropriation to a dependency of the United States and to make an appropriation to a State for a state purpose, there would be no warrant for construing anything said in the Social Security Act decisions—which were rendered only three weeks after the decision in the Cincinnati Soap Company case—as intended to apply to a case like the instant case. The Court itself, however, was careful to point out in the Social Security Cases that its ruling in those cases has no application to a question like the one presented here.

In the *Steward Machine Company case* the Court said:

> "In ruling as we do, we leave many questions open. * * * * In the tender of this credit *Congress does not intrude upon fields foreign to its function.* The purpose of its intervention, as we have shown, is to safeguard its own treasury and as an incident to that protection to place the states upon a footing of equal opportunity. Drains upon its own resources are to be checked; obstructions to the freedom of the states are to be leveled. It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or *to any other end legitimately national.* The Child Labor Tax Case, 259 U. S. 20, and Hill v. Wallace, 259 U. S. 44, were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. United States v. Constantine, 296 U. S. 287. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being ap-

proximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future."

In *Ashwander v. United States*, 297 U. S. 288, on which respondents rely, the contract involved was clearly within the federal power. The Wilson Dam and the power plant connected with it had been constructed for purposes of national defense and the improvement of navigation. Their construction was authorized by the National Defense Act of June 3, 1916. In authorizing the construction Congress was acting clearly within its war and commerce powers. (297 U. S. p. 326). The Court held that the water power and the electric energy generated at the dam being the property of the United States, "Authority to dispose of property constitutionally acquired by the United States is expressly granted to Congress by Sec. 3, Art. IV of the Constitution."

As to the means, which the government might employ in disposing of its property, the Court said *"we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States.* See Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 S. Ct. 655, supra." (297 U. S. 338).

The Court held that the transmission lines to be purchased would provide a proper means of disposing of the electric energy. It said that the government had the same right to acquire the transmission lines as the means of conveying its electric energy to market as it would have to acquire mules or horses and equipment to carry silver to market from a silver mine owned by the government on its public domain; and said that "the acquisition of these lines raises no different constitutional question, (than would be raised in the sup-

posed case of the silver mine) *unless in some way there is an invasion of the rights reserved to the State or to the people.*" (297 U. S. p. 339).

The Court held that on the facts presented in that case, which concerned only the Wilson dam, and the disposition of the electric energy generated at the dam, that there was no basis for concluding that there was an invasion of the rights reserved to the States. It said, *"The government is not using the water power at the Wilson dam to establish any industry or business."* It said further, "The question here is simply as to the acquisition of the transmission lines as a facility for the disposal of that energy. And the government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States."

VII.

Title II of the National Industrial Recovery Act is an unconstitutional delegation of the power of the Congress to spend for the general welfare.

It is fundamental that somewhere in the discretionary power delegated to executive or administrative officials there must be found an adequate standard to govern their action. If this standard is not expressly stated in the statute, it will, if possible, be found in the expressed purpose of the statute. Title II of the National Industrial Recovery Act contains no such standard except as it may be found in the declared purpose of the Act, to-wit: that the power delegated and the funds appropriated shall be used for the relief of unemployment. Unless the statute is construed so as to restrict the authority of the Federal Emergency Administration of Public Works and to prohibit it from using the funds placed at its disposal for any other purposes than the expressed statutory purpose of

relieving unemployment—as we have hereinbefore argued that it should be construed—then, we submit, that clearly it is an unlawful delegation of legislative power.

Whether, even if the statute be so construed and the power delegated be so restricted, it is nevertheless still subject to condemnation as an unconstitutional delegation of legislative power is discussed in the brief for the petitioner in Alabama Power Co., petitioner, v. Harold L. Ickes, Federal Emergency Administrator of Public Works, et al, respondents. (2 cases, 84 and 85). This feature of the case is there argued quite fully and further discussion of it by us would be needless repetition.

VIII.

Title II of the National Industrial Recovery Act, as applied to this case and as construed to authorize the action of the Public Works Administrator herein, deprives the petitioner of its property without due process of law in violation of the Fifth Amendment of the United States Constitution.

We think that this proposition follows as a matter of law from the propositions heretofore urged and that, therefore, it calls for no separate discussion. Willoughby, Constitutional Law (2nd Ed.), Sect. 1114; Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254; Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. Ed. 204.

IX.

The Petitioner is entitled to maintain this suit for an injunction against the illegal construction of said Buzzard Roost plant as a Federal Public Works project.

1. *The action of the Federal Administrator in including the Greenwood County project in the so-called comprehensive program of public works, and in allotting federal funds for the construction of the project under the provisions of Title II of the National Industrial Recovery Act, will be the proximate cause of the injury which petitioner will sustain.*

This was found as a fact by the District Court both on the original hearing and on the retrial. On the original hearing Judge Watkins found that the project would be constructed "solely through funds furnished by the Federal Emergency Administrator of Public Works," and that construction through any other source was not in the contemplation of the parties. (R. 122). On the retrial Judge Glenn found that, "While technically the Greenwood County authorities initially made the application they would never have had any shadow of a hope of financing such a project had it not been for the aid which was rendered by the federal government under the terms of the applicable statute. To contend otherwise is simply foolish in the face of the facts." (R. 785).

The South Carolina Statute, (Act No. 1095 of the Acts of 1934, 38 Stat. at L., 2020), authorizing the Finance Board of Greenwood County to borrow money from the Public Works Administration for the construction of the project, expressly declared that the project was to be self-liquidating, "and that any indebtedness or obligation created by the said Board shall not be a direct and primary obligation of the County of Greenwood."

Greenwood County will contribute nothing towards the construction of the plant and incur no liability for its con-

struction. The entire cost will be defrayed by funds furnished by the Federal Administrator. He will make the County an outright gift of 30% of the cost, and will supply the balance in the form of a so-called loan, no part of which, either the principal or interest, will be repayable except out of the earnings, if any, of the plant.

The injury to petitioner will be the inevitable result of the act of the Federal Administrator in authorizing the project,—a result necessarily contemplated at the time of the authorization. Rates were fixed below those of petitioner in order to attract petitioner's customers, and contracts subject to the Administrator's approval were made with petitioner's customers. The very conditions under which the loan is being made contemplate the taking of petitioner's business, and the repayment of the loan even in part necessitates the continuation of rates which will attract petitioner's business. The immediate loss of business will be in excess of $250,000 annually, and the continued operation of the plant at rates below petitioner's rates will force petitioner to make material reductions in its rates. (R. 558-63, 568-70).

It is well settled that a defendant is responsible for the consequences of his wrongful act which might reasonably have been foreseen. Milwaukee & St. Paul R. R. Co. v. Kellogg, 94 U. S. (4 Otto) 469. He is presumed to intend the natural and probable consequences of his acts, and when, as here, the injury is the result of such acts he cannot deny that he caused the injury.

The effect upon petitioner's rates and business was not only reasonably foreseeable but was in fact foreseen. The Administrator in authorizing the project intended that it should be constructed, that after its construction it should be operated in direct competition with petitioner, that it should charge rates substantially below petitioner's rates,

and that it should take business from petitioner. He knew that his act in authorizing the project and in allotting the funds for its construction, was calculated to damage petitioner, and would in fact damage it.

As heretofore pointed out petitioner is not complaining of competition by the County and a decree in favor of petitioner would leave the County free to compete with petitioner in any lawful way. What petitioner is complaining of, as we have heretofore stressed, is the action of the Administrator in including the Buzzard Roost project in the so-called comprehensive program of public works and in allotting federal funds for its construction as a federal public works project. Respondents nevertheless contend that the right of Greenwood County to compete with petitioner operates as a nonconductor breaking the chain of causation between the unlawful action of Administrator and the damage to petitioner. However should the plant be constructed its operation by the County in competition with petitioner would arise out of and be an immediate consequence of this action of the Administrator.

The rule that the construction of a municipal competing plant may be enjoined, if the construction would be illegally financed, as, for instance, by the issuance of bonds in violation of a constitutional or statutory debt limitation, is well established. And it is no defense to a suit by a utility which would be injured by such competition that the utility has no exclusive franchise, and that the municipality has the lawful right to compete with it. If the respondents position were sound, such a suit would fail on the ground that the municipality having the lawful right to compete, no right of the plaintiff would be infringed and the resulting damage would be *absque injuria*. Contrary to the contention of the respondents, however, the right of the utility to maintain such a suit is uni-

formly recognized. City of Campbell v. Arkansas-Missouri Power Co., 55 F. (2d) 560; Oklahoma Utilities Co. v. City of Hominy, 2 F. Supp. 849; Iowa Southern Utilities Co. v. Cassill, 69 F. (2d) 703; Gallardo v. Porto Rico Ry. L. & P. Co., 18 F. (2d) 918; Colorado Central Power Co. v. Municipal Power Development Co., 1 F. Supp. 961; Mississippi Power Co. v. City of Starkville, 4 F. Supp. 833; Frost v. Corporation Commission of Oklahoma, 278 U. S. 515, 73 L. Ed. 483.

This principle is even more clearly shown by Citizens Electric Illuminating Company v. Lackawana & Wyoming Valley Power Co., 255 Pa. 145. There a utility company was permitted to enjoin the defendant from selling electricity to another utility which was lawfully competing with plaintiff. The sale violated law, but there would be no injury except for the lawful competition. That the plaintiff had no right against the lawful competition was held to be beside the point. The issue, was, rather, whether the defendant in furnishing electricity to the competing plant was violating the law. And since it was, the court held that an injunction would issue.

The general principle that a wrongdoer cannot shield himself behind a legal right of a third party and that liability exists as against him notwithstanding the fact that there is no liability against the third party, is well established by numerous authorities.

In 18 Harv. L. Rev., at page 412, Professor Ames said:

> "The wilful causing of damage to another by a positive act, whether by one man alone, or by several acting in concert, and whether by direct action against him or *indirectly by inducing a third person to exercise a lawful right*, is a tort unless there was just cause for inflicting the damage." (Italics supplied).

Mr. Justice Holmes in 8 Harv. L. Rev., at page 11, states the principle as follows:

> "To sum the matter up in a rule, where it is sought to make a man answerable for damage, and the act of a third person is nearer in time than the defendant's to the harm, if the third person's act was lawful, it stands like the workings of nature, and the question is whether it reasonably was to be anticipated or looked out for; but if the third person's act was unlawful, the defendant must be shown to have intended the act, or at least to have expected it, and to have intended consequences which could not happen without the act."

In Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, the plaintiff's employees might have left its service at any time they pleased, and no legal right of the plaintiff would have been infringed. Yet plaintiff was permitted to maintain its suit against the defendants to enjoin them from unlawfully inducing its employees to quit its service, although it would have had no cause of action against the employees themselves if they had quit of their own accord.

In Truax v. Raich, 239 U. S. 33, the employment was at will and plaintiff's employer had a legal right to discharge him at any time and for any or no reason. Nevertheless plaintiff was granted an injunction against the enforcement of a state statute prohibiting the employment of aliens, the enforcement of which would have caused plaintiff's employer to discharge him. He would have had no cause of action against the employer for discharging him, but he did have a cause of action against the enforcement of an unconstitutional statute which would have caused his discharge.

In Hammer v. Dagenhart, 247 U. S. 251, the mill might have discharged plaintiff's minor son at any time without

violating any duty owed the plaintiff. Yet the plaintiff was entitled to an injunction against the enforcement of a federal statute which would have caused the discharge of his son.

In Pierce v. Society of Sisters, 268 U. S. 510, the patrons of plaintiff's school were free to withdraw their patronage whenever they chose to do so. Yet the plaintiff was granted an injunction against the enforcement of a statute which would require plaintiff's patrons to send their children to public schools. If in that case this court had followed the theory advanced by counsel for respondents in the instant case, it would have denied the plaintiff any relief upon the ground that the threatened injury to the plaintiff would be the result of the lawful action of its patrons in exercising their legal right to cease patronizing the school, and hence that no legal right of the plaintiff would be invaded. This court would have looked only at the last link in the chain of causation producing the plaintiff's injury, and would have refused to see that back of this link, as the active and real cause of the injury, was the unlawful action of a state officer in enforcing an unconstitutional state statute requiring plaintiff's patrons to send their children to a public school.

2. *The petitioner's business is a private property interest which the law will protect against invasion through the unlawful acts of a public official.*

In Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, to which we have just referred, the defendants, state officials, intended to enforce the Compulsory Education Act of the State of Oregon requiring parents or other persons having the control of children between stated ages to send them "to a public school" during each school year. The plaintiffs operated private schools in competition with the public schools. The public schools

had a perfect right to compete with plaintiffs and plaintiffs had no right by contract or otherwise to have the children sent to their schools. Yet the plaintiffs did have the right to operate their schools without unlawful interference, and since the Act under which the defendants claim the right to act was unconstitutional, and since the "inevitable practical result" of the threatened act of the defendants would be the destruction of plaintiffs' schools, an injunction was granted for the protection of the plaintiffs' rights. The Court said:

> "Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan, and Terrace v. Thompson, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; Duplex Printing Press Co. v. Deering, 254 U. S. 443, 65 L. ed. 349, 16 A.L.R. 196, 41 Sup. Ct. Rep. 172; American Steel Foundries v. Tri-City Cent. Trades Council, 257 U. S. 184, 66 L. ed. 189, 27 A.L.R. 360, 42 Sup. Ct. Rep. 72; Nebraska Dist. v. McKelvie, 262 U. S. 404, 67 L. ed. 1047, 43 Sup. Ct. Rep. 628; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 27 A.L.R. 375, 42 Sup. Ct. Rep. 124, and cases there cited."

Respondents contend that a suit for injunction does not lie against a public official unless he would be liable to suit if he threatened to do as an individual what he proposes to do as a public official. This contention of respondents entirely leaves out of account the fact that in such suits it is the officer's abuse of authority which is the wrong complained of and the real cause of complainants injury.

It is, we think, unnecessary to point out the absurdities to which this contention would lead if carried to its logical conclusion or to consider whether the doctrine even as urged by respondents is applicable to the facts of this case. The doctrine was expressly rejected by this court in Ex parte Young, 209 U. S. 123, and is in direct conflict with a long line of decisions, some of which are cited in Pierce v. Society of Sisters, *supra*, upholding the right of an individual, who will be specially grieved by the unlawful acts of a public official, to enjoin such action.

In Philadelphia Co. v. Stimson, 223 U. S. 605, the established doctrine was stated by the court as follows:

> "Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing in the name of the State unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. Ex parte Young, 209 U. S. p. 159. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of invasion of private property."

3. *A public official may be enjoined from illegal acts involving the unauthorized expenditure of public funds at the suit of an individual who will be specially grieved thereby.*

In *Frothingham v. Mellon*, 262 U. S. 447, 486, 67 L. Ed. 1078, 1084, the plaintiff brought suit to enjoin the enforcement of a Federal Appropriation Act. She sued only in her capacity as a taxpayer of the United States, and the sole ground of her suit was that the Act was invalid and would increase the burden of her taxes.

The court denied the right of a federal taxpayer to maintain such a suit upon three grounds:

First. "*His interest* in the monies of the Treasury—partly realized from taxation and partly from other sources—*is shared with millions of others;* is comparatively *minute and indeterminable;* and the effect upon future taxation of any payment out of the funds so *remote, fluctuating* and *uncertain* that no basis is afforded for an appeal to the preventive powers of a court of equity." (Italics supplied).

Second. That to permit such a suit to be maintained by any taxpayer would subject public officials to the inconvenience of a multiplicity of actions and thereby unduly embarrass them in the administration of their public duties, because, "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, * * * in respect of every other Appropriation Act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."

Third. That the court has no power to review Acts of Congress except at the suit of a party "able to show not only that the statute is invalid, but that he *has sustained or is immediately in danger of sustaining some direct injury as*

the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (Italics supplied).

It will thus be noted that the very authority which established in this court the general rule that a taxpayer who will sustain no injury other than that suffered in common with other taxpayers cannot sue to enjoin the enforcement of a statute whose administration requires the outlay of public monies, is equally clear in its recognition of the exception which permits such a suit by a party who has sustained or is immediately in danger of sustaining some direct injury as the result of the enforcement of such a statute.

In Warner-Quinlan Asphalt Co. v. Carlisle, 158 App. Div., N. Y. Sup. Ct. 638, the plaintiff sued to enjoin the letting of a certain contract for highway repairs, on the ground that the proposal for bids contained specifications which were in violation of the state highway law. It alleged that it was a producer of liquid asphalt which answered all the tests prescribed in the proposals except the forbidden specifications, and that the inclusion of these wrongfully precluded it from furnishing asphalt for state highway work. The court held that the case presented not simply the question of prohibiting the plaintiff from becoming a bidder upon state work, but that the denial to the plaintiff of an opportunity to bid was an injury to its business which was a property right, and that the plaintiff had a standing in court to enjoin the illegal infringement of this right. The court reviewed the New York authorities, holding "that an officer of the state cannot be enjoined at the suit of an individual taxpayer *who has no special rights or grievances aside from the great mass of taxpayers.*" But held that the plaintiff's suit came within the exception to the general rule and could be maintained "because of the threatened injury to his individual rights."

In restraining illegal action by a public official at the suit of a party specially grieved by such action, a court of equity is exercising a well established equitable jurisdiction. It is under this head of equitable jurisdiction that equity restrains officials of the government from acts constituting an invasion of individual rights where such acts are not authorized by statute, or where the statute authorizing them is void because in conflict with some provision of the Constitution. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620, 32 S. Ct. 340, 56 L. Ed. 570; *Lane v. Watts*, 234 U. S. 525, 540, 34 S. Ct. 965, 58 L. Ed. 1440; *Colorado v. Toll*, 268 U. S. 228, 230, 45 S. Ct. 505, 69 L. Ed. 927; *Pierce v. Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070; *Ferris v. Wilbur*, (C. C. A. 4th) 27 F. (2d) 262; *Pomeroy's equity*, Sec. 1345; *Pomeroy's Equitable Remedies*, Secs. 321, 326; *Hill v. Darger*, 8 F. Supp. 189; 32 C. J. 240, 247, 261, 264.

On the same principle equity will enjoin a common or public nuisance at the suit of a private person who will suffer a special grievance therefrom. *The Mayor of Georgetown v. The Alexandria Canal Co.*, 12 Peters 91, 98-100, 9 L. Ed. 1012, 1015-6; *Corning v. Lowerre*, 6 Johns. Chan. 439.

Even the enforcement of a criminal statute will be enjoined on the ground of its unconstitutionality at the suit of a private individual who will be specially injured in his property rights by the enforcement of the statute.

In *Truax v. Raich*, 239 U. S. 33, 37, 60 L. Ed. 131, 133, the court said:

> "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors' (Re Sawyer, 124 U. S. 200, 210, 31 L. Ed. 402, 405, 8 Sup. Ct. Rep. 482), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, *when*

the prevention of such prosecutions is essential to the safeguarding of rights of property. Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, 47 L. Ed. 778, 780, 23 Sup. Ct. Rep. 498; Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. Ed. 169, 177, 25 Sup. Ct. Rep. 18; Ex parte Young, supra; Philadelphia Co. v. Stimson, 223 U. S. 621, 56 L. Ed. 577, 32 Sup. Ct. Rep. 340. *The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law.* (Italics supplied).

The objection to suits by taxpayers generally to restrain the enforcement of appropriation statutes on the score that to permit such suits would lead to a multiplicity of actions, with the attendant inconveniences resulting therefrom, has no application to a suit by a party specially grieved. The interest that will justify such a suit is of a sort that will give rise to no such danger or inconvenience. This is illustrated by the fact that the validity of even a criminal statute may be challenged by a party who will sustain a direct injury to his property rights by the enforcement of the statute.

In the instant case the action of the Administrator in authorizing the project and in allotting funds for its construction will inflict special injury upon petitioner and his action being unauthorized and illegal, for the reasons hereinbefore argued, the petitioner's right to relief comes squarely within the doctrine of the foregoing authorities.

4. *Cases relied on by respondents.*

Railroad Co. v. Ellerman, 105 U. S. 166, is relied upon by respondents. The plaintiff in that case was the operator of certain public wharves. He sought to restrain a lease by the defendant railroad of certain wharves owned by it, which were to be operated in competition with the plaintiff. The plaintiff's right to relief, if any, this court concluded, rested

upon plaintiff's assertion that the lease was beyond the corporate powers of the defendant, Railroad Company; and this issue the court said the plaintiff could not raise as only the state or a stockholder could raise the question of ultra vires under the circumstances. The case is an application of the familiar principle that only the state, a stockholder, or in some instances a creditor, may question the violation of powers contained in a corporate charter. It has no applicability here.

In Edward Hines Trustees v. United States, 263 U. S. 143, and Sprunt & Sons v. United States, 281 U. S. 249, the plaintiffs complained of the removal of rates which created a discrimination in plaintiff's favor. It was contended the change was caused by an order of the Commission, but this court concluded that in neither case had the plaintiff shown its injury was proximately produced by the Commission's order. In the Hines case the court said:

> "It is not alleged that the carriers wish to impose such charges (those removed by the order) and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered." (p. 148).

In the Sprunt case this Court similarly said:

> "The carriers who were respondents before the Commission filed the new rates presumably because they now desire them. Nothing to the contrary is shown. So far as the carriers are concerned, it is as if the new rates had been filed wholly of their own accord and as if there had never been a controversy before the Commission." (p. 256).
>
> "A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside, the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so." (p. 258).

No such situation is here presented. The evidence establishes, and the District Court found on both trials, that petitioner's injury will be brought about by the Administrator's action. It is his use of federal funds that would make possible petitioner's injury, and this injury is the necessary and intended result of that use of such funds. Furthermore petitioner is not complaining of the removal of a discrimination practiced against others, as were the plaintiffs in the Hines and Sprunt cases—petitioner is complaining of the destruction of its business and property by the unlawful action of a public official.

In the Chicago Junction Case, 264 U. S. 258, the New York Central Railroad Company secured the approval of the Interstate Commerce Commission for the purchase by the New York Central of the terminal roads entering Chicago. This purchase would have resulted in extensive damage to plaintiff's business, and could not have been made except with the Commission's approval. This approval by the Commission this court concluded was the proximate cause of the damage to plaintiff's business, and plaintiff was consequently held entitled to put in question its legality. The court said:

> "If, as suggested in Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry Co., 218 U. S. 88, 109, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here." (p. 266).

The case directly supports petitioner's contentions here. In the absence of the Transportation Act the New York Central could have acquired the desired roads without any approval by the Commission. But that Act injected into the picture the Interstate Commerce Commission as the controlling factor as to whether the purchase could be made, and thus the legality of the official action of the Commission became material. Similarly Greenwood County is free at any time to lawfully compete with petitioner, but here the

proximate cause of the injury which petitioner will sustain is the subsidy of federal funds to be advanced by the Administrator, and therefore the legality of his action becomes material.

The respondents add nothing to their argument by the contention that petitioner's right to operate is subject to "a congenital defect" within the meaning of that term as used in Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, and in Madera Water Works Co. v. Madera, 228 U. S. 454. The phrase is catchy, but it does not alter the principle that although the holder of a non-exclusive franchise cannot complain of legal competition, yet he is entitled to be protected against unlawful action which proximately results in his damage. In the Puget Sound case the plaintiffs sought to enjoin the enforcement of a city ordinance which subjected it to a license or excise tax based on gross income, on the ground that the ordinance denied to it equal protection of the laws, in that the city was operating a municipal plant whose income was not subject to the tax. The Court held that since the city had the right to compete with the plaintiff the competition created no illegality in the ordinance of which the plaintiff could complain in its suit against the city. In the Madera case the plaintiff contended that its franchise should be construed as an exclusive franchise, and that therefore the threatened competition by the city would be illegal. The Court construed the franchise as conferring no exclusive right on the plaintiff, and hence the plaintiff's suit against the City necessarily failed. The cases plainly have no application to the question here presented. In them the fact of municipal ownership was relied on to create the illegality complained of. Here the illegality complained of is the illegal use of federal funds and a decree in favor of the petitioner would not affect the right of municipal operation.

X.

The District Court should have limited the retrial of the cause to the question of whether or not there had been any material change in the cause supervening since the entry of the original decree of injunction, as alleged in the respondents' motion for remand, and, upon the failure of respondents to establish the allegation of their motion, the District Court erred in granting respondents a rehearing of the original cause and in permitting them to introduce evidence in contradiction of the evidence taken on the original hearing and should have considered and determined the questions involved in the case and rendered its decree herein on the record as made on the original hearing.

This court remanded the cause for retrial solely on the *allegation* of the motion of the Administrator that Judge Watkins had held that certain provisions of the contract of December 8, 1934, were in excess of Greenwood County's authority under the laws of South Carolina and that these provisions had been eliminated by substitution of the new contract of November 30, 1935. Upon the cause being remanded respondents failed to establish this allegation of their motion. Hence the entire basis for a retrial failed. Under these circumstances to permit the defendants thus to gain the benefit of a rehearing of the original cause and thereby to obtain an opportunity to introduce evidence in contradiction of the evidence taken on the original hearing was manifestly in conflict with firmly established rules of procedure. Southard v. Russell, 16 How. 547, 14 L. Ed. 1052; Gray v. Murray, 4 Johns. Ch. 412; Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381; Beard v. Burts, 95 U. S. 434, 24 L. Ed. 485; Society of Shakers v. Watson, 23 C.C.A. 263, 77 Fed. 512, 515; Lavagnino v. Prall, 281 Fed. 581, 583; Street, Fed. Equity Practice, Vol. II, p. 1274; Putnam v. Day, 22 Wall. 60, 64.

This court in remanding the case did not set aside any of the proceedings theretofore had in the District Court. It did not reverse the decree of that court for any error committed by the court. It merely vacated the decree of that court in order that it might be free to investigate the allegation of the motion that there had been a material change in the case since the entry of its final decree. Therefore, the proceedings had in the District Court up to the point of entry of the final decree were unaffected and remained as a part of the record of the cause.

In The Board of Supervisors of Wayne County v. Kennicott, 94 U. S. (4 Otto) 498, 24 L. Ed. 260, this Court in reversing a decree of the Circuit Court upon a former appeal ordered that the cause be remanded "with directions to award a new trial." However, when the case came back on a second appeal the court said:

> "Technically, *there can be no 'new trial' in a suit in equity; and as our mandates are to be interpreted according to the subject matter of the proceeding here,* and if possible, so as not to cause injustice (Story v. Livingston, 13 Pet., 359), it is proper to inquire what must have been intended by the use of that term in the decree, *since it cannot have its ordinary meaning.* * * * Under these circumstances, it is apparent that *the words 'new trial' were used to convey the idea of such further action as should be found necessary to carry into effect what had been already decided.* No error has been assigned upon the proceedings in the Circuit Court under the mandate construed in this way, and the decree of the Circuit Court is, therefore, affirmed."

The majority opinion of the Court of Appeals calls attention to the fact that the decree of the District Court was set aside pursuant to the mandate of this court and states that the setting aside of the decree left the cause in pre-

cisely the same position that it would have occupied if no final decree had ever been entered and that "there can be no doubt as to the power of the court in an equity cause, until final decree has been entered, to hear additional evidence and modify or set aside any finding of fact theretofore made." (R. 851). The Court of Appeals, however, lost sight of the fact that the decree of the District Court was set aside pursuant to the mandate of this court solely in order that the District Court might be free to investigate the question of whether there had been any material change in the case supervening since the decree of Judge Watkins as alleged in respondents' motion for a remand. But for the allegation of the motion the respondents would have had no right to a rehearing as the term at which the decree was rendered had long since expired. We repeat that the respondents, merely by the allegation of their motion, which they failed to support, could not gain the benefit of a rehearing to which otherwise they would not have been entitled.

We have hereinbefore argued the case on the record as supplemented on the retrial, contending that the evidence taken on the retrial strengthens and confirms the case made by petitioner on the original hearing. Yet the correctness of the action of the trial court in granting respondents a rehearing of the original cause and in permitting them to introduce evidence in contradiction of the evidence taken on the original hearing does arise on the record (R. 555-7, 641, 802-3); and, we submit, for the reasons stated above, that this action of the trial court was erroneous.

CONCLUSION

For the foregoing reasons it is submitted that the decree of the Circuit Court of Appeals should be reversed, and the cause remanded to the District Court with directions to enter a decree for the petitioner permanently enjoining the respondents from using any funds of the United States to construct the electric power plant described in the bill of complaint.

Respectfully submitted,

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